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# In the
# Supreme Court of the United States

OCTOBER TERM, 1983

KAISER ALUMINUM & CHEMICAL CORPORATION,

PETITIONER

versus

HARRIS A. PARSON,

RESPONDENT

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Where the district court has found "de facto, though unintentional discrimination", and found that the employer's reluctance in promoting an employee came not at all from the company's unwillingness to promote black employees because of any company based prejudice, but reluctance was based on other factors such as the company's not necessarily misplaced fear that the employee's promotion would trigger a violent and prolonged and thus expensive reaction on the part of certain white racially motivated employees, and the basic contention that the employee's below average motivation, absenteeism, marginal qualifications, and lack of company loyalty formed a questionable basis for promoting him to a supervisory position, may an employer be found as a matter of law to have intentionally discriminated on the basis of race against the employee?

2. Alternatively, may an employer be cast for prejudgment interest on back pay that is not authorized or allowed by 28 USC 1961 or any other statute when a suit filed September 1, 1967 does not reach judgment until May 18, 1983?

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---

# PETITION FOR WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

Kaiser Aluminum & Chemical Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals (Appendix K) is reported at 727 F.2d 473 (March 19, 1984). The opinion of the United States District Court for the Eastern District of Louisiana (Appendix J) is reported at 497 F.Supp. 339 (1980). The opinion of the Court of Appeals on the original appeal (Appendix D) is reported at 575 F.2d 1374 (1978).

The order of recusal of the original district judge, Fred J. Cassibry, is dated November 28, 1978 (Appendix F). Judge Cassibry's Findings of Fact and Conclusions of Law is dated May 22, 1974 (Appendix A).

## JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1984. A stay of mandate was issued through May 9, 1984. The jurisdiction of this court is invoked under 28 USC §1254(1).

## STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964 as amended, 42 USC §2000e and 28 USC §1961.

## STATEMENT OF THE CASE

Kaiser Aluminum & Chemical Corporation operated three plants in Louisiana: one in Chalmette, one in Gramercy, and one in Baton Rouge. Harris A. Parson, a black man, at all times pertinent has been employed in the Chalmette plant as a furnace operator, a senior hourly position in the Metal Products Department. The Chalmette plant is located in St. Bernard Parish, and, as District Judge Beer found, when the plant was built in 1951 that parish was one of the most segregated and racially divided parishes in Louisiana, and that tradition and many results that are directly and indirectly related thereto continued, perhaps in diminished intensity, up to and through all times pertinent. In 1956, Kaiser commenced the employment of blacks in its Production Department. Before October, 1965 all two hundred and nine (209) supervisors at the Chalmette Works were white, and at the time,

approximately fifteen per cent (15%) of the eighteen hundred and seventy-three (1,873) hourly production workers were black. Between July 2, 1965 and September 3, 1971 nine (9) blacks were promoted to shift foreman. By February, 1973, when the case was first tried in the United States District Court, Kaiser had recruited and promoted some twenty-nine (29) blacks to salaried management positions including foreman, industrial relations representatives, accounting, and various technical services positions. Kaiser changed from departmental seniority in bidding to plant seniority in 1962.

In 1966 and in 1967 Harris Parson asked to be considered for promotion to shift foreman. He made a third application in February of 1973, and was rejected all three times, notwithstanding the fact that during that period of time Kaiser was actively seeking to promote qualified blacks into management in Chalmette.

The case was originally tried in 1973 before the Honorable Fred Cassibry, district judge. Judge Cassibry dismissed the plaintiff's suit on May 22, 1974 concluding that on all occasions, Kaiser's decision not to promote Parson to foreman was not racially motivated. He said:

> In June, 1966, an on several occasions thereafter, Parson requested to be considered for promotion to foreman and/or Foreman Trainee in the Metal Products Department. The testimony at trial revealed that Parson was considered for promotion to foreman but did not get the job because he did not possess or demonstrate the requisite attributes necessary to perform the job. Parson did not get the job of foreman not because he was black but rather because he was not qualified. In fact, other black men had made foreman and

> other salaried positions in a number of departments of the Chalmette Works. For example, the Senior Industrial Relations Representative and the Supervisor of the Employment Office, who was in charge of the recruiting and hiring of all hourly workers, are both black. (Appendix B)

On appeal, the United States Court of Appeals for the Fifth Circuit reversed and remanded for additional proceedings under its then conception of the controlling legal principles. The trial judge, Fred J. Cassibry, by his Order of November 28, 1978, recused himself from the case stating:

> In this case which I handled over a period of nine years, the opinions of the panel simply stated that I had completely *ignored* the law *and* the evidence. Such a statement impugns my integrity.... As though they were addressing a Judge with a long history of ignoring the rights of blacks and minorities under the law, which is not the case as my record will demonstrate. I was admonished that:
>
> > 'in the midst of jurisdictional change and complexity, the Court should not lose sight of its primary obligation, which is to ensure that the victims of illegal racial discrimination receive the full measure of relief to which the law entitles them.'
>
> I resent this gratuitous and improper preaching. I have never lost sight of this obligation. It may be that Kaiser Aluminum and the Steelworkers' Union might feel more reassured if the suggestion had included a reminder that our primary obligation is also to dismiss suits brought against Corporations and Unions if they have no merit.

The case was realloted to Judge Peter Beer who conducted the trial on remand in 1980. Judge Beer regarded the Fifth Circuit Court of Appeals' Opinion of 1978 as a mandate and as the law of the case, and Kaiser submits he considered it a mandate to find liability against the defendant. So he did, by his Opinion of August 28, 1980. Judge Beer's comments on his own Opinion during a hearing on April 6, 1983 demonstrates that he did not find Kaiser intended to discriminate against Harris Parson because of his race. On that day, Judge Beer said:

> ...And I must say, in my own findings, I found that ultimately I concluded that though it could go either way, he was at least marginally qualified. There was never any indication that this was a sterling operator who was not getting this promotion strictly because of racial overtones. Quite the contrary, and I don't mind stating for some reviewing court, it was apparent to me, that at best, all other considerations to the contrary notwithstanding, Parson was right on the thin edge of the wedge, as far as falling into, or out of the qualified area. I ultimately concluded that he should be dealt with as in it.

The district judge entered judgment on May 18, 1983 in the sum of One Hundred Thirteen Thousand, Ninety-Three Dollars and Seventy-Four Cents ($113,093.74), Seventy-One Thousand, Six Hundred and Sixty-Nine Dollars ($71,669) of which was principal but not reduced for taxes, and the balance of which was compounded interest as set out in the Special Master's report of February 7, 1983. (Appendix H). It is petitioner's position that the district court's errors were induced by the misleading pronouncements of law by the Fifth Circuit in its Opinion reported at 575 F.2d 1374 in 1978. In affirming

these errors, the Fifth Circuit's Opinion, reported at 727 F.2d 743 (1984) glosses over the teachings of *Furnco Construction Corporation vs. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978); *Pullman-Standard v. Swint*, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d. 66 (1982); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); and *U.S. Postal Service Bd. of Governors v. Aikens*, __ U.S. __, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983), pronouncements rendered subsequent to the Fifth Circuit's original opinion.

## REASONS FOR GRANTING THE WRIT

### I. THE COURT OF APPEAL HOLDING THAT THE EMPLOYER INTENTIONALLY DISCRIMINATED AGAINST THE EMPLOYEE IN A PROMOTIONAL DECISION WHERE THE DISTRICT COURT HAS MADE NO SUCH FINDING IS CONTRARY TO THIS COURT'S HOLDINGS IN *FURNCO, BURDINE,* AND *AIKENS, SUPRA,* AND NEEDS RESOLUTION BY THIS COURT.

As this Court has observed in *Pullman-Standard vs. Swint*, 102 S.Ct. 1781 (1982) at p. 1788, the circuit court, in its 1978 opinion in the instant case (reported at 575 F.2d 1374), remanded on its independent determination of discriminatory purpose under its then dichotomy between "subsidiary" facts and "ultimate" facts (*see* the discussion of Parson's Individual Claim at 575 F.2d at 1382-1393). On the second appeal, which resulted in the Opinion reported at 727 F.2d 473, the court re-cast the district judge's findings of fact in an effort to have them satisfy the legal requirements set out in *Burdine* and *Aikens, supra.* However, in doing so the circuit court ignored the trial judge's findings:

> 9. Though Parson's immediate supervisors were justifiably not particularly impressed with Parson's work record, it is apparent that his effort in his own behalf in seeking promotions were, to some extent, frustrated on the basis of his other activities at the plant.
>
> ***
>
> 11. Accordingly, on the basis of the mandate by which this court is governed, the burden shifted to Kaiser to show why subsequent to Title VII, July, 1965 Parson was not promoted to shift foreman.

which clearly demonstrates he was acting under pre-*Furnco*, *Burdine*, and *Aikens* precepts. The trial judge's decision was made in ignorance of these Supreme Court holdings because those decisions had not been rendered as of August 28, 1980 when Judge Beer published his decision.

The trial judges, however, never found as a fact that Kaiser intended to discriminate on the basis of race against Parson. At 497 F.Supp. at 342, footnote 2, Judge Beer said:

> In this connection, it is important to note that Kaiser's reluctance in promoting Parson came not at all from the company's unwillingness to promote black employees because of any company based prejudice. The reluctance was based upon other factors, such as the company's not necessarily misplaced fear that Parson's promotion would trigger a violent and prolonged (and, thus, expensive) reaction on the part of certain white, racially-motivated employees and the basic contention that Parson's absenteeism, etc., formed a questionable basis for eagerness to promote him to a supervisory position.

On that same page, at Finding Of Fact 13, he wrote:

> Kaiser *has* demonstrated valid business practices for the failure of Parson's promotion efforts in his own behalf but has failed to carry the heavy burden of proving that its selection practices as they concern Parson were *essential* to recognized business goals of safety and efficiency.

and at Finding Of Fact 15:

> ...Top management at Kaiser was making a good faith effort with respect to job opportunity and job advancement for blacks at Kaiser but was confronted by real possibilities of slow-downs, sabotage and personal confrontations in connection with enforcement of these opportunities. Even, so, there is evidence of instances of de facto discrimination occasioned by timidness and vacillation resulting from fear and concern for the overall plant operations. This de facto (though unintentional) discrimination is understandable and yet unacceptable....

At Finding Of Fact 16, at p. 343, Judge Beer stated:

> The same may be said to be true of Parson, who was neither an exceptionally well qualified nor a clearly unqualified furnace operator at the times pertinent. He was average. Perhaps his motivation and company loyalty were somewhat below average and perhaps his basic understanding of furnace operations (at least from the standpoint of length of actual experience with furnace operations) were somewhat above average. Perhaps the promotion to foreman of Parson, who had been

> both outspoken about and physically involved in Kaiser's own good faith efforts to commence a program of plant desegration, could have been precipitous in a plant where racial tensions clearly existed. Even so, and acknowledging this court's incalculable advantage of looking back instead of being there on the firing line at the critical times here involved, it is the court's ultimate determination that Parson's promotion to foreman would, more likely than not, have come to pass by August of 1967 but for all of the problems above described. Very real problems confronted Kaiser, and that company can neither be censured nor greatly criticized for the methods which they then chose to deal with these problems. Nevertheless, their overall response visited a burden on Parson's quest for promotion that was sufficiently disproportionate as to require a basic finding that *they have not carried the burden imposed by the reviewing court in this case.* (Emphasis added).

It was because the Fifth Circuit Court of Appeals' decisions as to the burden of proof to be borne by defendants conflicted with the interpretations of this Court's precedents adopted by other courts of appeal that certiorari was granted in *Burdine, supra,* and the Fifth Circuit's decision was then vacated, and remanded for application of the correct standard. The Court of Appeals Opinion in *Parson* II at 727 F.2d 475 and 476 gives lip service to this Court's decisions in *Burdine* and *Aikens, supra,* and then proceeds to reconstruct from the district court's finding of fact an intent on the part of Kaiser to intentionally discriminate against Parson. In doing so the court totally ignores the trial judge's explanation and comment upon his fact finding during the proceedings of April 6, 1983 when he said:

> I concluded that though it could go either way, he was at least marginally qualified. There was never any indication that this was a sterling operator who was not getting this promotion strictly because of racial overtones.

As this Court explained in *Aikens, supra,* at p. 1482:

> In short, the district court must decide which party's explanation of the employer's motivation it believes.

The district judge did this and expressed that he believed Kaiser's motivations to be non-discriminatory. However, because he was operating under a misconception of law, based upon the court of appeals' 1978 Opinion, Judge Beer found liability on the part of Kaiser. Again, in *Aikens, supra,* at 103 S.Ct. 1482, the Court said:

> ...There will seldom be 'eyewitness' testimony as to the employer's mental processes. But none of this means the trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact....

And finally in the *Aikens, supra,* at p. 1483 the Court observed:

> The law often obliges finders of fact to inquire into a person's state of mind. As Lord Justice Bowen said in treating this problem in an action for misrepresentation nearly a century ago:
>
> > 'The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it

> can be ascertained it is as much as fact as anything else.'
> *Eddington v. Fitzmaurice*, 29 Ch.Div. 459, 483 (1885)

The district court was unaware that the respondent was required to submit evidence of discriminatory intent. It focused its inquiries on the Fifth Circuit's pre-*Burdine* and *Aikens*, conception of the law. Notwithstanding that fact, the court recognized:

> ...Kaiser's reluctance in promoting Parson came not at all from the company's unwillingness to promote black employees because of any company based prejudice. 497 F.Supp. at 342.
>
> ***
>
> This de facto (though *unintentional*) discrimination is understandable and yet unacceptable. (Emphasis supplied) 497 F.Supp. at 343.

In its finding of intentional discrimination, the court of appeal sought support in a quotation from the testimony of Richard Humphrey [727 F.2d at 477]. That quotation not only does not supply any support for the court of appeal's substitution of "intentional" for the district court's expressed "unintentional" finding, but, to the contrary, demonstrates that Kaiser, acting through the senior man in the Metal Products Department, Richard Humphrey, was making a serious, mature, studied effort to promptly bring the Chalmette Plant into full compliance with the Civil Rights Act of 1964. The cross-over from union member/hourly worker, to first level of management, and consideration of fair employment practices under the Civil Rights Act of 1964 was serious business that had the attention of senior supervision in 1966 and 1967, a fact that

comes as no great surprise when one realizes that the petitioner here is one of the petitioners in *United Steelworkers, Etc. vs. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 11 L.Ed.2d 480 (1979).

## II. THE COURT OF APPEALS HOLDING WITH REGARD TO COMPOUNDED PRE-JUDGMENT INTEREST ON BACK PAY COMPUTED ON THE DIFFERENCE BETWEEN PARSON'S PRE-TAX EARNINGS FROM 1967 TO MID-1982, IS NEITHER AUTHORIZED NOR ALLOWED BY 28 USC 1961, OR ANY OTHER ACT OF THE CONGRESS.

The back pay award approved by the court of appeal consists of Seventy-One Thousand, Six Hundred and Sixty-Nine Dollars ($71,669) as principal, being the difference between Parson's earnings from September 1, 1967 through the first half of 1982 and the average earnings of shift foremen in the Metal Products Department for those years, without discount for income, or social security, or any other taxes, and that compounded interest as computed by the Special Master and explained in his report of February 7, 1983, brought the judgment for principal and interest to the sum of One Hundred and Thirteen Thousand, Ninety-Three Dollars and Seventy-Four Cents ($113,093.74) through June 30, 1982. Petitioner submits that pre-judgment interest should not be allowed because there is no explicit statutory authority for allowing interest on back pay. 28 USC 1961 only provides for the award of post-judgment interest. Not only does the judgment allow for compounded interest from the filing of suit until the time of judgment, but under any make whole theory principal should be discounted by the amount of the tax liabilities, and interest, if it is to be allowed, computed on the net.

Petitioner further submits that interest on interest is not favored in the law, although that principle does not prevail in the face of a statute recognizing compound interest. *United States v. Glasser*, 287 F.2d 433 (7th Cir. 1961).

## CONCLUSION

For the reasons stated above, Kaiser respectfully requests this court to grant its petition in this case for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Petition For Writ of Certiorari has been served upon:

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this the ____ day of May, 1984 by placing same in the United States Postal Service postage prepaid.

_____
Carl J. Schumacher, Jr.

# APPENDIX "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 67-1257

SECTION "E"

HARRIS A. PARSON and ARCELL WILLIAMS

Plaintiffs

versus

KAISER ALUMMINUM AND CHEMICAL CORPORATION, LOCAL 225, ALUMINUM WORKERS INTERNATIONAL UNION, CHALMETTE, LOUISIANA AND INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA

Defendants

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## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action brought pursuant to Title VII of the "Civil Rights Act of 1964", as amended, 42 USC §2000e, *et seq.*, and Section 1 of the "Civil Rights Act of 1866", 42 USC §1981, in which plaintiffs, individually and as representatives of a class, have prayed for relief for alleged discrimination in employment.

This matter is now before the Court on motions filed by all defendants at the conclusion of plaintiffs' case in

chief for involuntary dismissal. I grant defendants' motion for involuntary dismissal and make the following findings of fact and conclusions of law.

## FINDINGS OF FACT.

1.

Plaintiff, Harris A. Parson (hereinafter referred to as "Parson") is a Black citizen of the United States and the State of Louisiana.

2.

Plaintiff, Arcell Williams (hereinafter referred to as "Williams") is a Black citizen of the United States and the State of Louisiana.

3.

Defendant, Kaiser Aluminum and Chemical Corporation (hereinafter referred to as "Kaiser") is a corporation organized under the laws of the State of Delaware and maintains and operates an aluminum reduction plant in Chalmette, Louisiana (hereinafter referred to as "Chalmette Works"). It is an employer in an industry affecting commerce and employs more than twenty-five employees.

4.

Defendant, United Steelworkers of America, AFL-CIO CLC (hereinafter referred to as "Steelworkers"), is a labor organization in an industry affecting commerce, and has more than twenty-five members. The Steelworkers

became the certified collective bargaining agent for all production and maintenance employees at the Chalmette Works on August 9, 1972, after merging with and succeeding defendant, International Union of District 50, United Mine Workers of America (hereinafter referred to as "District 50").

5.

Defendant, District 50, became the collective bargaining agent for production and maintenance employees on July 14, 1968, succeeding defendant, Aluminum Workers International Union and its Local 225. District 50, the Aluminum Workers, and Local 225 are or were all labor organizations in an industry affecting commerce and have or had more than twenty-five members.

6.

Defendant, Local 13000, United Steelworkers of America (hereinafter "Local 13000"), which was prior to merger a local union of District 50, is a labor organization in an industry affecting commerce, and has more than twenty-five members.

7.

This action was brought individually by Parson and Williams and was subsequently amended to allege a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure. The Court heretofore has found that this is a valid class action pursuant to Rule 23 of the Federal Rules of Civil Procedure and that the class consists of all Black

hourly employees who were employed at the Chalmette Works at the time of trial.[1]

8.

Plaintiff, Parson. was first employed at the Chalmette Works as a laborer in August, 1953. After holding several intermediate jobs, Parson was promoted on July 27, 1964 to the job of furnace operator which is a top job in the Metal Products Department. Parson's promotion to the job of furnace operator was prior to the effective date of the Civil Rights Act of 1964.

9.

In June, 1966, and on several occasions thereafter, Parson requested to be considered for promotion to foremand and/or Foreman Trainee in the Metal Products Department. The testimony at trial revealed that Parson was considered for promotion to foreman but did not get the job because he did not possess or demonstrate the requisite attributes necessary to perform the job. Parson did not get the job of foreman not because he was black but rather because he was not qualified. In fact, other black men have made foreman and other salaried positions in a number of departments of the Chalmette Works. For example, the Senior Industrial Relations Representative and the Supervisor of the Employment Office, who is in charge of the recruiting and hiring of all hourly workers, are both black.

---

[1] Determination of the class, in part, was made by sending a notice to all hourly Black employees employed by Kaiser at the Chalmette Works at the time of trial. All employees who chose *not* to be bound by this action are listed in Appendix A.

10.

The process for the selection of a foreman by Kaiser is untainted by any overtones of racial discrimination. Although the post of foreman is not controlled by the Collective Bargaining Agreement, as vacancies occur they are posted on the plant bulletin board and any employee can initiate, on his own behalf, an application for consideration as foreman. All applications for foreman are considered by a review board. Individuals who have initiated an application are reviewed and evaluated by a Management Committee composed of: the Industrial Relations Superintendent, the Employee's Supervisor, the Departmental Supervisor where the vacancy exists, the plant manager or his designee, and a Black representative.

11.

Plaintiff, Williams, was first employed at the Chalmette Works as a laborer in January, 1953. Williams worked in several jobs and departments during the 13-year period that he was employed by Kaiser. In 1962 Williams became an assistant furnace operator (the second highest job in the department) in the Metal Products Department.

12.

In July, 1966, Williams was given a five-day suspension prior to discharge and was subsequently discharged. The evidence demonstrates that Williams had a long and poor disciplinary record and was dismissed for just cause.

13.

Following his discharge, Williams filed a grievance

with Local 225, which was subsequently processed through the various steps of the grievance procedure as set forth in the parties' Collective Bargaining Agreement. After Local 225 investigated all of the facts surrounding Williams' complaint, the grievance was dropped short of arbitration. The Court finds that neither Local 225 nor the Aluminum Workers breached its duty of fair represenation to Williams in its handling of his grievance.

14.

Plaintiffs complain that Kaiser discriminated against blacks as a class, by "(r)equiring (them) ... to use segregated shower rooms, lunch rooms, comfort facilities and drinking fountains located at its plant." However, the testimony at trial proved that beginning in 1963, Kaiser actively moved to desegregate its facilities by removing all signs and by posting notices on the company bulletin boards that all the facilities at the Chalmette Works were available to all employees. The company even tore down some of its existing facilities and rebuilt them into single room facilities that were available to all employees. The evidence demonstrates that today there are no segregated facilities at the Chalmette works.

15.

Plaintiffs complain that Kaiser not only discriminated against plaintiff Parson in failing to promote him to foreman but discriminated against blacks, as a class, in "failing and refusing to promote...the class...to foremen". As previously indicated herein, the evidence quite clearly demonstrated that blacks occupy many salaried positions at the Chalmette Works. There was no evidence indicating any present effects of any past discrimination which may

have existed and the evidence relating to the selection process for foreman currently in operation at the Chalmette Works revealed no obstacles, overt or subtle, which prevent blacks from being promoted to the position of foreman. In fact, the very selection process that permits an individual to initiate his application for foreman and to be reviewed by a diversified Selection Committee contains appropriate safeguards to insure that blacks will be given consideration equal to that of whites.

16.

Plaintiffs complain that Kaiser refused to "promote and upgrade" the class, represented by plaintiffs "because of their race". To the contrary, the evidence adduced at trial indicated that blacks were in top positions even before the effective date of the Civil Rights Act of 1964, and since July 1, 1965, the upward movement for blacks has not been retarded by any artificial barriers or requirements. In fact, the evidence showed both that blacks and whites enjoy the same upward mobility and that there are no present effects of past discrimination.

17.

Plaintiffs complain that Kaiser discriminated against the class by "engaging in racial discriminatory policies and practices by and through means of enforcing more stringent punitive measures for infraction of rules against Negro employees". The record is totally void of any evidence to support this claim. As previously indicated, the disciplinary action taken by Kaiser against plaintiff Williams, which ultimately resulted in his termination, was justified.

Plaintiffs complain that Kaiser discriminates against the class by maintaining "...a promotional and seniority system which continues and preserves, and which has the effect of continuing and preserving, Kaiser's policy, practice and usage [of] limiting the employment and promotional opportunities of Negro employees of the company because and by reason of color". Plaintiffs also allege that Kaiser has discriminated against the class by "(d)enying Negro employees the same rights of transfer...as are afforded white employees." The complaints relative to promotion and/or upgrading have been considered above. Similarly, this Court finds that the seniority system employed by Kaiser does not "limit the employment and promotional opportunities of Negro employees" nor does Kaiser deny "Negro employees the same rights of transfer".

Although there was some testimony to the effect that blacks were excluded from some departments in the early 1950's, it was shown that by 1956, black employees had begun to transfer to almost every department at the Chalmette Works. There was also uncontroverted evidence that plant seniority was established for all purposes within the production departments by 1962 and that the same principle was applied in the craft departments by 1965. It was further shown that the seniority system in effect since 1962 allowed any employee to bid for a vacancy within his department on the basis of his total continuous plant seniority. It was further shown that, although there are lines of progression in the various departments, an employee is not required to bid up the line job by job, but rather he may bid to any job in the department for which there is a vacancy and in so doing may move around other employees who are junior to him by plant seniority. It was

further shown that an employee wishing to transfer between departments, who is a successful bidder, enters the new department for a 10-day trial period and if he decides that he does not like the department or the job to which he has transfered, he has a right to return to his former job without losing any seniority. On the other hand, if he wishes to stay in the new department, after expiration of ten day period, the employee is free to bid on the basis of his qualifications and plant seniority on any vacancy in that department. The evidence established beyond a doubt that many black employees have taken advantage of these transfer opportunities and have rapidly advanced to higher paying jobs.

This Court finds that the method of transfer from department to department at the Chalmette Works does not discriminate against the class. This Court further finds that there is no loss in an employee's seniority as a result of his transferring between departments and that there is full plant seniority carryover on all such transfers. It should also be noted that a substantial number of black employees, who testified at the trial, had reached the top jobs in their respective departments prior to the passage of the Civil Rights Act of 1964. Such evidence clearly illustrates that the seniority system, as developed through the collective bargaining process does not now nor did it historically exclude blacks or other employees from utilizing their plant seniority for transfer and promotion at the Chalmette Works.

19.

Plaintiffs have generally claimed that the testing and training procedures employed at the Chalmette Works discriminates against the class. The testimony at the trial

indicated that prior to 1968, the company had required all applicants to pass the "Wonderlic Test" and various other tests used for promotional purposes within the departments of the Chalmette Works. In 1968 Kaiser evaluated their testing procedures and determined that the process was not valid for the purposes utilized. Consequently, in the latter part of 1968, the company abolished the testing procedure then in operation. There is, however, no evidence in the record to suggest that but for the use of the tests prior to 1968, any member of the class would have obtained a higher paying position. Except for some craft positions, no testing is currently utilized. In order to qualify for a crafts position an applicant need only possess two years industrial experience or comparable trade school or service connected experience. For some craft jobs an applicant is required to perform a practical exercise, such as building a cement brick wall, to demonstrate his qualifications as a bricklayer. I find that the requirement that applicants for crafts positions possess some experience does not discriminate against the class.

20.

The testimony revealed that the training for most positions at Kaiser is obtained through direct observation and participation in the particular tasks of that job ("on-the-job training"). However, in some instances Kaiser has developed training programs for certain positions. There was no evidence at the trial that these methods of training discriminated against the class. In fact the testimony indicated that blacks were able to avail themselves of these training opportunities and thereby advance as rapidly as whites up the line of progression in the various departments at the Chalmette Works.

21.

Plaintiffs have generally complained that the "lay-off pool" discriminates against the class. The "lay-off pool", which is fully described and detailed in the Collective Bargaining Agreement, sets forth the procedure which is followed when there is a partial or plantwide reduction in the work force at the Chalmette Works. This Court finds from the evidence adduced at trial that this mechanism, for determining which employees must leave the plant in the event of a reduction in the work force and which employees are returned to work when the work force is increased after reduction, does not discriminate against the class because there was no past discrimination in hiring laborers.

22.

Plaintiffs claim that the defendants, Local 225, District 50 and Steelworkers, discriminated against the class as follows:

> (a) Refusing and failing to file and process grievances which refusal is the result of racial discrimination pursued by the Local.
>
> (b) Refusing and failing to accord plaintiffs and the class represented fair and adequate representation.
>
> (c) Otherwise generally discriminating agianst plaintiffs and the class represented because of and by reason of their race.

However, with the exception of testimony relating to plaintiff Williams, plaintiffs failed to introduce any conclusive evidence with regard to the contentions relating to unfair

representation in the dday-to-day handling of grievances. This Court has previously indicated its position regarding Local 225's process of Williams' discharge grievance.[2] The evidence introduced by the plaintiffs with respect to union representation revealed that the unions consistently processed the grievances of black employees in good faith; the testimony also revealed that blacks have continually held significant positions in the various unions.

## CONCLUSIONS OF LAW

1.

This Court has jurisdiction of this action pursuant to 28 USC §1345 and 42 USC §2000e-5(f)(3).

2.

The individual plaintiffs, Parson and Williams, are authorized to institute this action under 42 USC §2000e, *et seq.*, and 42 USC §1981.

3.

Under Rule 23 of the Federal Rules of Civil Procedure, Parson and Williams represent a class which consists of all Black hourly employees who were employed at the Chalmette Works at the time of trial, with the exception of those individuals who opted not to be represented by Williams and Parson and who are listed in Appendix A hereto.

---

[2] Local 225 had successfully processed a prior discharge grievance in 1965 for Williams which resulted in Williams' reinstatement.

4.

Defendant, Kaiser, is an employer within the meaning of Section 701(b) of the Civil Rights Act of 1964, 42 USA §2000e(b) and is engaged in an industry affecting commerce within the meaning of Section 701(h) of the Act, 42 USC §2000e-(h).

5

Defendant, Steelworkers, is a labor organizaation within the meaning of Section 701(d) of the Civil Rights Act of 1964, 42 USC §2000e-(d) and is engaged in an industry affecting commerce within the meaning of Section 701(e) of the Civil Rights Act of 1964, 42 USC §2000e-(e).

6.

Defendant, District 50, which merged with Steelworkers, is a labor organization within the meaning of Section 701(d) of the Civil Rights Act of 1964, 42 USC §2000e-(d) and is engaged in an industry affecting commerce within the meaning of Section 701(e) of the Civil Rights Act of 1964, 42 USC §2000e-(e).

7.

Defendant, Local 225, is a labor organization within the meaning of Section 701(d) of the Civil Rights Act of 1964, 42 USC §2000e-(d) and is engaged in an industry affecting commerce within the meaning of Section 701(e) of the Civil Rights Act of 1964, 42 USC §2000e-(e).

8.

Defendant, Kaiser, did not discriminate against Parson within the meaning of 42 USC §2000e, *et seq.* or 42 USC §1981 and, particularly, Kaiser did not violate the provisions of 42 USC §2000e, *et seq.* or 42 USC §1981 in failing to promote Parson to the position of foreman.

9.

Defendant, Kaiser, did not discriminate against Williams within the meaning of 42 USC §2000e, *et seq. or 42 USC* §1981 and, particularly, Kaiser did not violate the provisions of 42 USC §2000e, *et seq.* or 42 USC §1981 in terminating Williams' employment.

10.

Defendant, Local 225, did not discriminate against Williams within the meaning of 42 USC §2000e, *et seq.* or 42 USC §1981 and, particularly, did not violate the provisions of 42 USC §2000e, *et seq.* or 42 USC §1981 with respect to handling Williams' grievances.

11

Defendants, Kaiser, Local 225, District 50, and Steelworkers, have not since July 1, 1965, and do not presently discriminate within the meaning of 42 USC §2000e, *et seq.* or 42 USC §1981 against the class previously identified and represented by Williams and Parson. The Court further concludes, as a matter of law, that there are no present effects of any past discrimination at the Chalmette Works.

12.

Defendant, Kaiser, has not maintained segregated facilities at the Chalmette Works since July 1, 1965, and, accordingly, has not violated the provisions of 42 USC §2000e, *et seq.*

13.

While some segregated facilities were maintained by Kaiser at times prior to July 1, 1965, in violation of 42 USC §1981, the class is not now entitled to an injunction for such previous violations. An injunction is remedial, not punitive, *Hodgson v. First Fed. Sav. & L. Ass'n*, 455 F.2d 818 (5th Cir. 1972), and looks to the future, not the past, *Dombrowski v. Pfister*, 380 U.S. 479 (1965). Thus, an injunction should not issue where the basis for it has been removed, *Roberts v. Pegelow*, 313 F.2d 548, 552 (4th Cir. 1963); *Black v. Brown*, 355 F.Supp. 925 (N.D. Ill. 1973).

14.

Defendant, Kaiser, has not discriminated against the class in the selection of foremen since July 1, 1965, and, accordingly, has not violated the provisions of 42 USC §2000e, *et seq. Rowe v. General Motors Corp.*, 451 F.2d 418 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972).

15.

The class is not entitled to any affirmative relief for any possible pre-July 2, 1965 discrimination in the selection of foremen. An injunction is not in order since any alleged violations have been cured and no member of the class is entitled to back pay for these alleged violations

since back pay claims under §1981 are limited to July 2, 1965, the effective date of Title VII of the Civil Rights Act of 1964, *Johnson v. Goodyear Tire and Rubber Co.*, 7 DPD ¶9233 (5th Cir. Mar. 27, 1974), and plaintiffs have failed to show that the class sustained any damages after July 1, 1965 as a result of possible violations.

16.

Defendant, Kaiser, has not since July 1, 1965, and does not now discriminate against the class with respect to its policies relating to promotion and upgrading and, accordingly, has not violated either the provisions of 42 USC §2000e, *et seq.*, or the provisions of 42 USC §1981 from that date. Plaintiff is not entitled to the affirmative relief sought for violations of 42 USC §1981 occurring prior to that date because the prohibited conduct has ceased, back pay prior to July 1, 1965 is not recoverable, and there is no evidence of present effects of past discrimination.

17.

Defendant, Kaiser, does not discriminate against the class with respect to its policies relating to disciplinary action for the infraction of company rules and, accordingly, has never violated the provisions of 42 USC §2000e, *et seq.* and 42 USC §1981.

18.

Defendants, Kaiser and Steelworkers, do not now discriminate and have not discriminated since at least July 1, 1965, with respect to their promotional and seniority system, including the transfer provisions thereof, and, accordingly, have not violated the provisions of 42 USC

§2000e, *et seq.* While violations of 42 USC §1981 may have occurred in this area prior to that date, no injunction will issue because the prohibited behavior has long since ceased, and no damages are recoverable for back pay prior to that date. Further, unlike the seniority systems discussed and analyzed in *Johnson v. Goodyear Tire & Rubber Co.*, 7 EPD ¶9233 (5th Cir. Mar. 27, 1974); *Bing v. Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973); *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); *United States v. Hayes International Corp.*, 456 F.2d 112 (5th Cir. 1972), the promotional and seniority system, including the transfer provisions thereof, in effect at the Chalmette Works does not disclose any present effects of past discrimination, nor has the system prevented members of the class from achieving the top position to which they are entitled.

19.

Defendant, Kaiser, has not since 1968 discriminated against the class with respect to its testing and training procedures and, accordingly, is not presently violating the provisions of 42 USC §2000e, *et seq.* or 42 USC §1981. Kaiser, on its own motion, has abolished written testing, especially the "Wonderlic Test", and has guided itself in conformity with *Griggs v. Duke Power Co.*, 401 U.S. 424 (1970); *United States v. Georgia Power Co., supra*, and *Johnson v. Goodyear Tire and Rubber Co., supra.* While the use of the Wonderlic Test prior to 1968 may have constituted unlawful discrimination, no injunction will issue because the violations have long since been corrected and no award for back pay will be made because the mere showing of discriminatory employment practices is not by itself a proper premise for making a back pay award. There must be more, namely, "positive proof that plaintiff was

ordinarily entitled to the wages in question and being without fault, would have received them in the ordinary course of things but for the inequitable conduct of the party from whom the wages are claimed". *United States v. Georgia Power Co.*, 474 F.2d 906, 921, 922 (5th Cir. 1973); *Jinks v. Mays*, 464 F.2d 1223, 1226 (5th Cir. 1972). Since there has been no presentation of positive proof that any members of the class would have achieved a higher paying position but for the use of the Wonderlic Test, the class is not entitled to recover any damages for back pay.

20.

Defendants, Kaiser and Steelworkers, do not now nor have they in the past discriminated against the class with respect to the operation of the "lay-off pool", and, accordingly, have not violated the provisions of 42 USC §2000e, *et seq.* and 42 USC §1981. Unlike the layoff provisions discussed and analyzed in this Court's opinion in *Watkins v. Steel Workers (USA), Local 2369*, 7 EPD 9130 (E.D. La. Jan. 14, 1974), the lay-off pool operative at the Chalmette Works does not discriminate against black employees.

21.

Defendants, Local 225, District 50 and Steelworkers, do not now nor have they in the past discriminated against the class with respect to the filing and processing of grievances and providing fair and adequate representation and, accordingly, have not violated the provision of 42 USC §2000e, *et seq.* and 42 USC §1981.

22.

In accordance with the foregoing conclusions of law,

there shall be judgment in favor of defendants, Kaiser, Local 225, District 50, and Steelworkers, and against plaintiffs, Parson and Williams, individually and as representatives of the class of all hourly employees employed at the Chalmette Works at the time of trial, with the exception of those noted on Appendix A, dismissing their complaint, as amended, at their costs.

New Orleans, Louisiana, May 22, 1974.

/S/ Signed
UNITED STATES DISTRICT JUDGE

Copy to all counsel

## APPENDIX "B"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 67-1257

SECTION "E"

HARRIS A. PARSON and ARCELL WILLIAMS

VERSUS

KAISER ALUMMINUM AND CHEMICAL CORPORATION, LOCAL 225, ALUMINUM WORKERS INTERNATIONAL UNION, CHALMETTE, LOUISIANA AND INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA

JUDGMENT

This cause came on for trial on a former day, and after hearing testimony of witnesses and argument of respective counsel, the Court took the matter under submission.

Now, therefore, considering the written reasons of the Court on file herein, and considering the direction of the Court as to entry of judgment,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Kaiser, Local 225, District 50, and Steelworkers, and against plaintiffs, Harris A. Parson and Arcell Williams, individually and as representatives of the class of all hourly employees

employed at the Chalmette Works at time of trial, with the exception of those noted on Appendix A, dismissing their complaint, as amended, at their costs.

New Orleans, Louisiana, this 23rd day of May, 1974.

/S/ Signed
UNITED STATES DISTRICT JUDGE

## APPENDIX "C"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 67-1257

SECTION "E"

HARRIS A. PARSON

Plaintiff,

v.

KAISER ALUMMINUM and CHEMICAL CORPORATION, and LOCAL 13000, UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,

Defendants

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ORDER

Upon consideration of plaintiff's Motion to Alter or Amend Judgment, filed pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, and for good cause shown:

IT IS ORDERED that the Findings of Fact and Conclusions of Law, issued by this Court on May 23, 1974, are amended as follows:

1. Amend paragraph 18 of the Findings of Fact pp. 6-8 to add the following additional sentence:

"The findings in this paragraph do not apply to the seniority and progression practices in the Power Department established by a Training Agreement between Kaiser and Local Union 13000, dated May 27, 1969. The legality of seniority and progression practices under that agreement was not raised in this action and is not decided by the Court."

2. Amend paragraph 19 of the Findings of Fact p. 8 so that the sixth full sentence will read as follows:

"Except for some craft positions (and except for entry to the Power Department under the 1969 Training Agreement), no testing is currently utilized."

3. Amend paragraph 19 of the Conclusions of Law (pp. 14-15) to add the following additional sentence:

"The conclusions in this paragraph do not apply to the testing practices established by the 1969 Training Agreements. The legality of these testing practices was not raised in this action or decided by the Court."

4. Amend paragraph 3 of the Conclusions of Law (p. 10) to read as follows:

"Under Rule 23 of the Federal Rules of Civil Procedure, Parson and Williams represent a class, with respect to the issues raised in this action and decided by the Court, which consists of all Black hourly employees who were employed at the Chalmette works at the time of trial, with the exception of those individuals who opted not to be

represented by Williams and Parson and who are listed in Appendix A hereto."

/S/ Fred J. Cassibry
FRED J. CASSIBRY
United States District Judge

Dated: June 19, 1974.

APPENDIX "D"

Harris A. PARSON,

Plaintiff-Appellant,

v.

KAISER ALUMINUM & CHEMICAL CORP., and Local 13000, United Steelworkers of America, AFL-CIO, CLC,

Defendants-Appellees.

No. 74-3468.

United States Court of Appeals, Fifth Circuit.

July 10, 1978.

Appeal was taken from an order of the United States District Court for the Eastern District of Louisiana, Fred J. Cassibry, J., dismissing individual and class claims of racial discrimination in employment. The Court of Appeals, Brown, Chief Judge, held that: (1) the district judge's failure to find sufficient subsidiary facts to undergird the ultimate finding that a decision not to promote the individual plaintiff was not racially motivated or taken in retaliation for the plaintiff's involvement in racial relations at the plant required a reversal and a remand for an articulation of the basis for the judge's conclusion that the plaintiff was not qualified for the position; (2) the district judge erred in judging the plaintiff's individual claim as if his promotion request had been processed under a procedure adopted six years later; and (3) in concluding that the employer had not discriminated against the class in

selection of foremen since the effective date of Title VII, the district judge erred by ignoring the continuing effects of pre-1972 procedures for selection of foremen, by ignoring the statistics relied on by plaintiff to document those effects, and by ignoring testimony as to individual instances of discrimination.

Reversed and remanded.

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Nils R. Douglas, New Orleans, La., Richard B. Sobol, Anne P. Buxton, Washington, D.C., for plaintiff-appellant.

Carl J. Schumacher, Jr., Donald R. Mintz, New Orleans, La., Alfred D. Trehene, Washington, D.C., John C. Falkenberry, Birmingham, Ala., Burk & Burk, New Orleans, La., Michael H. Gottesman, Washington, D.C., for defendants-appellees.

Robert J. Allen, Jr., Oakland, Cal., for Kaiser Aluminum, Etc.

Jerry L. Gardner, Jr., New Orleans, La., for Local 225.

D'Amico & Curet, Baton Rouge, La., for United Machine Workers of America, Int'l Union 50.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before BROWN, Chief Judge, THORNBERRY, Circuit Judge and MILLER*, Associate Judge.

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* Of the U.S. Court of Customs and Patent Appeals sitting by designation.

JOHN R. BROWN, Circuit Judge:

Plaintiff, a black employee at the Chalmette, Louisiana plant of Kaiser Aluminum and Chemical Corporation (Kaiser), appeals from a judgment dismissing his individual and class claims of racial discrimination in employment. Finding errors of both fact and law in the dismissal at the close of the plaintiff's case, we reverse and remand.

I.

In July 1966, the named plaintiff, Harris Parson, filed a charge with the Equal Employment Opportunity Commission (EEOC) under section 706(e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e), claiming that Kaiser discriminated against him on the basis of his race in refusing to promote him to the position of foreman. Parson also alleged that Kaiser maintained racially segregated facilities and that, with the cooperation of the employees' bargaining representative, Local 225 of the Aluminum Workers International Union (Local 225),[1] denied black employees equal opportunities for advancement. The EEOC found reasonable cause to believe that Kaiser and Local 225 engaged in discriminatory practices and, after attempting a cure by conciliation, issued Parson a right to sue notice in August 1967.

Parson brought suit in September 1967, seeking relief against Kaiser under the Civil Rights Act of 1866,

[1] At the time legal proceedings began, Local 225 was the bargaining representative for Kaiser's employees. Several replacements and mergers have occurred since that time, resulting in two changes in bargaining representative. These changes were reflected in additions to the party defendants named in the litigation. The present representative is Local 1300, United Steelworkers of America, AFL-CIO, CLC, named as a defendant and now an appellee in this suit.

42 U.S.C. § 1981,[2] and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*,[3] and against the Union

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[2] 42 U.S.C. § 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[3] 42 U.S.C. § 2000e-2 in pertinent part provides:

"(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * * *

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

* * * * * *

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment

for violations of Title VII and of the duty of fair representation imposed by 29 U.S.C. §§ 151 *et seq.* Another black employee, Arcell Williams, joined Parson in the suit, claiming that he had been discriminatorily discharged. Parson and Williams subsequently amended their complaint to include allegations of discriminatory employment practices against a class of black hourly employees.[4] After extensive

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(Footnote 3 continued)

> pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.
>
> * * * * * *
>
> 42 U.S.C.A. § 2000e-3 provides:
>
> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

[4] The District Court Judge ruled that the class action was valid under F.R.Civ.P. 23(b)(2) and found that the class consisted of all black hourly employees working at the Chalmette plant at the time of trial, except those who had chosen not to be represented by the named plaintiffs.

and prolonged pretrial proceedings, the case came to trial in 1973. At the conclusion of the plaintiffs' case, the defendants moved under F.R.Civ.P. 41(b) for an involuntary dismissal on the ground that "plaintiffs have shown no right to relief" on either their individual or class claims. The District Court recessed the trial, dismissed Williams' claim and, in May 1974, some fourteen months later, dismissed Parson's individual suit and the class action.[5] In its findings of fact and conclusions of law issued under F.R.Civ.P. 52(b), the District Court held that no discrimination was present in any of the actions or practices asserted by the plaintiffs. Parson appeals on behalf of himself and the class he represents from the judgment in favor of the defendants.

Although the complaint alleged a variety of discriminatory practices,[6] the appeal is limited to the following findings and conclusions: defendant Kaiser did not discriminate against Parson by refusing to award him the promotion he sought; Kaiser did not discriminate against the class in making promotions to supervisory positions; Kaiser did not discriminate in providing training and opportunities for entry to craft positions; and Kaiser and the Union did not discriminate in the contractual procedures governing bidding and transfers.

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[5] No appeal was taken from the dismissal of Arcell Williams' individual claim.

[6] In particular, plaintiffs do not contest the findings or conclusions that the following allegations were meritless: segregation in plant facilities; discrimination in promotion and advancement to nonsupervisory positions or positions outside the crafts; discrimination in sanctioning infractions of plant rules; and discrimination in the composition of the "lay-off pool."

We hold that as to each of these issues, the District Court erred in holding that no discrimination was evidenced and in dismissing the suit. We reverse and remand for further proceedings consistent with the standards developed in this Circuit and the Supreme Court for judging claims of racial discrimination in employment.

*II. The Challenged Employment Practices*

Kaiser is engaged in the production of aluminum from powered alumina at the Chalmette facilities. At the time of trial, the plant employed over 2,400 people, of whom approximately 20 percent were black. Kaiser has operated the Chalmette plant since 1951. At that time, blacks were hired only as laborers and the physical facilities of the plant were rigidly segregated.[7] Plaintiff's essential claim at trial and on this appeal is that insufficient progress has been made since then to satisfy the requirements of the civil rights statutes.[8]

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[7] Our understanding of the organization of the plant and the details of its operation is somewhat hampered by the absence of defendants' evidence and by the state of the record that does exist, which, as the plaintiff's brief concedes, is highly disorganized.

[8] Discrimination prior to the effective date of Title VII, July 2, 1965, can be considered under two theories. Since the appellant's allegations are also made under 42 U.S.C.A. § 1981 employment practices prior to 1965 may be examined. Secondly, this court specifically explained in *United States v. Jacksonville Terminal*, 451 F.2d 418, 441 (5th Cir. 1971), cert. denied, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972)...that pre-act discriminatory conduct is highly relevant, especially, when considering neutral practices under Title VII alleged to carry forward past discriminatory effects.

*Pettway v. American Cast Iron Pipe Co.*, 5 Cir., 1974, 494 F.2d 211, 218 n. 10.

*A. Promotions to the Position of Foreman*

The plaintiff presented evidence tracing the evolution of the procedures for selecting foremen from the hourly employees.[9] Until April 1966, Kaiser had no written procedures or standards governing such promotions. At that time, Kaiser adopted a system requiring each shift foreman to evaluate the hourly employees under his supervision every six months and report the names of likely candidates. Those listed would be further screened by the general foremen and departmental superintendents, and if approved, would be administered two personnel tests, the Wonderlic Test and the How to Supervise Test. The candidates achieving sufficiently high scores would then be classified as "trainee foremen," a status that allowed them to replace absent permanent foremen and, depending on their success, to advance to a permanent position as openings occurred. Parson's application for promotion was considered one month after this procedure had been adopted.

This system for considering applicants was modified in June of 1967 to ameliorate the requirement that an hourly employee could not become a candidate for a supervisory position without his immediate foreman's recommendation. The revised procedure required each foreman to submit the names of those employees who had indicated a wish to be promoted, "but whom the Foreman believes do not have the qualifications." An applicant not approved by either his shift foreman or the department superintendent was further reviewed by a committee authorized to reverse the previous decisions and allow the employee to take the personnel tests.

[9] The "Foreman Selection Programs" for 1966, 1967, 1968, and 1970 are set forth in Appendix, Vol. II, at 183-93, Plaintiff's Exhibit 52-55.

The following year, Kaiser's program was revised, apparently to reflect and anticipate changes in the law of employment discrimination. The use of the Wonderlic Test for identifying qualified candidates was eliminated after a validation study designed to relate the tests to the demands of the job failed.[10] In 1970, Kaiser further revised the selection methods by instituting a procedure for selecting permanent foremen. This procedure was based on annual evaluations and recommendations from immediate supervisors subject to review by general foremen and department superintendents. When vacancies occurred, the department superintendent and personnel relations superintendent would select candidates from the group judged qualified in the annual screening. These prospects were interviewed and a choice recommended for the final approval of the plant works manager.

The last revision in the selection procedure relevant to this litigation occurred in April 1972. For the first time, vacancies in shift foremen positions were posted on a central bulletin board. An hourly employee interested in the position requested an application form, and the applications, together with the written evaluation of the applicant's foreman, were screened by a committee that interviewed the leading candidates and made a final recommendation. The committee, which consisted of five persons, had a frequently changing membership, and in at least one instance documented in the record, the membership included blacks. In making its selections, the committee used a

[10] In May 1967, the EEOC found reasonable cause to believe that the Wonderlic Test discriminated against black employees. Kaiser's subsequent validation study revealed that twice as many blacks failed the test as whites and that the test did not accurately predict job performance for either race. See Plaintiff's Exhibit 67.

written list of criteria and standards. This list represents the first written standards guiding the selection of supervisors used at the Chalmette plant.

The plaintiff's brief paints the following statistical picture of Kaiser's foreman population.[11] In July 1965, when Title VII became effective, there were 209 supervisors employed at the Chalmette plant, all of whom were white. Of these, over 150 served as shift foremen, the position to which Parson aspired. In July of 1965, Kaiser employed 1,873 hourly production workers, of whom 15 percent were black. In September 1971, when Kaiser filed its last responses to discovery motions, 164 shift foremen served at the plant, of whom 8, or less than 5 percent were black.[12] At that time, more than 21 percent of Kaiser's hourly employees, and 29 percent of the hourly production workers, were black. Between July 1965 and September 1971, 9 blacks were promoted to shift foreman jobs. Between September 1971 and the time of trial, April 1973, 4 additional blacks were promoted.[13]

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[11] Kaiser and the Union contest the use of these statistics in Parson's brief to this Court, claiming that the figures are drawn from material never introduced into evidence, including answers to interrogatories, deposition testimony, and EEOC reports. Plaintiff admits that the data concerning the total number of foremen serving on a given date were drawn from Kaiser's answers to interrogatories not admitted into evidence. However, the information concerning the date and details of the appointments of black foremen is based on testimony and documents that were put in evidence at the trial. Plaintiff contends that the comparisons between these figures and the numbers concerning the total number of foremen can be drawn, in "somewhat less exact form," from Kaiser's Affirmative Action Report, which was introduced into evidence. Plaintiff's Exhibit 67. We have reviewed the record and are satisfied with the plaintiff's response.

[12] Four of the eight black supervisors were in charge of janitorial workers; only one supervisor of janitors was white.

[13] Because one of the black foremen selected before 1971 had taken disability leave and a second had transferred to a nonsupervisory position, only ten black foremen chosen under the pre-1972 procedures were working at the plant at the time of trial.

All but one of this last group was selected under the 1972 selection procedure.

*B. Interdepartmental Transfers*

A Kaiser employee who desires to transfer to a position in another department must follow the procedures established by the contractual agreement between Kaiser and the Union. The Supplement Seniority Agreement [sic] of February 1, 1972, in effect at the time of trial, requires that vacancies for permanent jobs (except those openings subject to "departmental job bids," discussed below) are to be posted at centrally located bulletin boards and that employees are to use a formal bidding system to apply for the openings. Success in transfer is determined by either plant seniority alone or by a combination of plant seniority and other qualifications. To assess the impact of these procedures, it is necessary to examine the development of the transfer and seniority systems before and after the effective date of Title VII.

Kaiser restricted blacks to menial positions—laborer and porter—from 1951 to 1956, when blacks were allowed to transfer to some production departments.[14] Entry into production departments remained subject to other restrictions, however. A "passing" score on the Wonderlic Test was required as a condition of entry to some of the production departments until 1968. Until 1962, departmental seniority determined eligibility for transfer and advancement: employees within a department would bid on vacancies on the basis of their relative length of service within

[14] During this period, the laborer and porter positions were held exclusively by blacks. The lowest position for which white employees were hired was that of "spare." Testimony of Isadore Booker; testimony of J. B. Sims, R., Vol. VII.

that department. In 1962, plant seniority was substituted for departmental seniority as the bidding standard within the production departments, and in 1962, plant seniority was adopted as the standard in the craft department as well. Under this system, an employee's eligibility for bidding is based on his total length of service at the Chalmette plant.

The plaintiff's major complaint as to the present transfer system is that employees transferring to a new department can bid only for entry level jobs in that department, usually the job of "spare." Vacancies for positions above the entry level are posted only within that department and only employees already in the department are eligible to bid. A transferring employee must occupy the spare position in the new department for a minimum of ten days, during which time he may elect to return to his old job with no loss in pay, seniority, or eligibility for promotion in the old department. At the end of the ten-day trial period, the transferee is eligible to bid for vacancies that arise in the new department on the basis of his plant seniority. If the spare job pays less than the job from which the employee was transferred, he must take the cut in pay until a higher paying job in the new department becomes available and the employee is able successfully to bid for it. A departmental employee thus has preference over employees from other departments for promotion to all non-entry level vacancies within his department.[15]

*C. Entry Into Craft Positions*

The craft positions at issue come within the jurisdiction of the Power Maintenance Department and the

[15] This system does not apply to those jobs for which prior service in another, related position in the department is a prerequisite for bidding.

Reduction Maintenance Department at the Chalmette plant.[16] Most of the craft positions are filled without on-the-job training or apprenticeship programs. The following requirements are or have been conditions for entry to such positions.

*Prior experience.* Most of the craft jobs require previous experience in the craft involved. While the length and type of experience required varies from craft to craft, industrial experience is preferred. There is some evidence in the record that this requirement is not consistently applied and that decisions to waive or modify it are within the discretion of the supervisor involved in the hiring process.

*Testing and educational requirements.* Beginning in 1959 and continuing until 1968, Kaiser required that an applicant achieve a certain score on the Wonderlic Test as a condition for entry to any craft position.[17] This requirement was dropped after a 1967 validation study indicated that the test could not satisfy the standards governing the permissible use of such employment devices.[18] Until 1968, Kaiser also required each applicant to take a written test relating to the skills of the particular craft involved. After these tests were eliminated, Kaiser used "structured interviews" to examine applicants orally on the same information. Until 1970, a

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[16] The plaintiff's brief lists the craft categories at issue as electrician, lagger, lineman, instrument repairman machinist, mechanic, painter, welder, air conditioning mechanic, automotive mechanic, blacksmith, bricklayer, and carpenter. This list does not include skilled positions that are filled by bidding on the basis of seniority rather than by hire or transfer. See note 19, *infra*.

[17] Kaiser did not require craftsmen who began work before the test was adopted to take the examination. All the exempt craftsmen were white.

[18] See note 10, *supra*.

high school diploma was a prerequisite for entry into several of the crafts.

*Training programs.* Kaiser adopted its first training program for craft jobs in April 1969. Under this program, which applied to the categories of electrician, instrument repairman, and mechanic, trainee jobs were open for plant-wide bidding. However, trainees were required to have completed two years of high school to be eligible for the mechanic program, to have a high school diploma for the other two craft programs, and to pass an aptitude test administered by the Louisiana State Employment Service. Two of the twelve craft trainees enrolled in the program after a little over one year of operation were black.

Parson draws on Kaiser's Affirmative Action Report for statistical information as to the impact of Kaiser's entry requirements.[19] Of the craftsmen employed in 1965, 3, or less than 1 percent, were black. In 1971, 8 out of 468 craftsmen, or approximately 2 percent, were black. At the time of trial, there were a total of 11 black craftsmen employed at the plant, all working in the Reduction Maintenance Department. While Parson concedes that

[19] The figures in Kaiser's report include skilled production jobs that plaintiff does not group with the craft categories involved in this appeal. Plaintiff complains of discrimination only in the entry requirements of those craft positions filled by hire or transfer rather than by bidding on the basis of seniority. Kaiser's "skilled craftsmen" count results in different numbers but similar ratios:

1967—629 white 4 black
1968—648 white 16 black
1969—655 white 24 black
1970—606 white 19 black
1971—591 white 23 black

Plaintiff's Exhibit 19.

complete figures as to employee turnover in the crafts since 1965 are not available, he convincingly uses Kaiser's 1970 Seniority List to provide a rough estimate.[20] This list shows that Kaiser hired 22 of the 96 craftsmen in the Power Maintenance Department after 1965; 1 of the 22 was black. Of the 365 craftsmen in the Reduction Maintenance Department, 65 were hired after 1965, and of these, 3 were black.

Parson bases his challenges to the District Court's findings on the premise that in each of the areas detailed—promotions to foreman, transfer, and entry to the crafts—he presented a prima facie case of racial discrimination.

### *III. The District Court's Judgment*

#### *A. Parson's Individual Claim*

Harris Parson was hired as a laborer at the Chalmette plant in 1953. In 1961, he transferred to the Metal Products Department as a "spare" and in 1964 was promoted to the semiskilled job of furnace operator, one of the top jobs in the department. In June of 1966, Parson requested that he be considered for the position of temporary foreman, the first black in his department to ask for such a promotion. After his request was denied, Parson filed a complaint with the EEOC and subsequently brought this suit. At trial, and on this appeal, Parson claimed that his work record was excellent, that his union activities demonstrated leadership capabilities, and that the only reasons for the failure to promote him were his race and his outspoken efforts to hasten the integration of the plant's

[20] See Plaintiff's exhibit 19.

facilities. To support his claim of racial discrimination, Parson introduced evidence of the comparative qualifications of white men who were promoted shortly after Parson's request was denied; asserted that the procedures for awarding promotions themselves violated Title VII; and urged that statistics comparing the number of black and white foremen to the racial composition of the hourly employee population showed a pattern of discrimination in promotions at the plant. At the close of plaintiff's evidence, the District Court Judge made the following finding of fact:

> "The testimony at trial revealed that Parson was considered for promotion to foreman but did not get the job because he did not possess or demonstrate the requisite attributes necessary to perform the job. Parson did not get the job of foreman not because he was black but rather because he was not qualified. In fact, other black men have made foreman and other salaried positions in a number of departments of the Chalmette Works."

[Appendix, Vol. I, at 25.] On this basis, the District Court Judge concluded that Kaiser had not discriminated against Parson.

In reviewing the District Court's findings of fact, we are mindful of our limited authority under the clearly erroneous standard of F.R.Civ.P. 52(a). However, we are equally mindful that the clearly erroneous standard does not apply to findings made under an erroneous view of controlling legal principles. *United States v. Jacksonville Terminal Co.*, 5 Cir., 1971, 451 F.2d 418, 423-24, *cert. denied*, 1972, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815; *Rowe v. General Motors Corp.*, 5 Cir., 1972, 457 F.2d 348, 356 n. 15. We are also careful in discrimination suits, where the

elements of fact and law become particularly intermeshed, of the distinction between findings of subsidiary fact and findings of ultimate fact. A finding of nondiscrimination is a finding of ultimate fact that can be reversed free of the clearly erroneous rule. "In reviewing the District Court's findings, therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous....[W]e must [also] determine whether there are requisite subsidiary facts to undergird the ultimate facts." *Causey v. Ford Motor Co.*, 5 Cir., 1975, 516 F.2d 416, 420-21 [citation omitted].

In a nonclass claim of employment discrimination under Title VII, the plaintiff carries the initial burden of proving a prima facie case of discrimination. The elements of a prima facie case were delineated in *McDonnell Douglas Corporation v. Green*, 1973, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668, 677: (i) the complainant must belong to a protected minority; (ii) must apply and be qualified for a job for which the employer is seeking applications; (iii) be rejected for the job; and (iv) the employer must then continue to seek applicants with the complainant's qualifications. When a plaintiff meets these criteria, the burden shifts to the defendant to show, by a preponderance of the evidence, that it had legitimate, nondiscriminatory reasons for its decision. If the defendant can meet this burden, the plaintiff must then prove, by a preponderance of the evidence, that the articulated reason is a pretext for discrimination. *McDonnell Douglas Corporation v. Green, supra*, 411 U.S. at 802-804, 36 L.Ed.2d at 677-79; *Turner v. Texas Instruments, Inc.*, 5 Cir., 1977, 555 F.2d 1251, 1255. The District Court's only finding of fact as to Parson's claim is that "he was not qualified" for the position of foreman. For the reasons outlined below, this finding

cannot stand and cannot serve as the basis for a Rule 41(b) dismissal.

The District Court Judge offered no hints as to the basis for his finding that Parson was not qualified for promotion to the position of foreman. We are simply unable to determine whether the Judge found sufficient subsidiary facts to undergird the ultimate finding that the decision not to promote Parson was not racially motivated or taken in retaliation for his involvement in racial relations at the plant.[21] It is therefore necessary for us to reverse the dismissal of Parson's claim and remand for an articulation of the basis for the Judge's conclusion that Parson was not qualified to become a foreman. This articulation is to include an examination of the comparative qualifications of nonblacks promoted to foreman.

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[21] Parson's shift foreman, Jim Saucier, his general foreman, Jim Cruse, and the superintendent of the Metal Products Department, Paul Petit, testified at trial or through depositions introduced as evidence as to their reasons for denying Parson the promotion. Reports and memos by Saucier, Cruse, and Jim Mayeaux, who served as Parson's foreman for a short time during the relevant period, both contemporaneous with the decision against promoting Parson and prepared later in connection with EEOC proceedings or this suit, were also introduced. These sources contain several different grounds for Parson's failure to obtain his promotion, including inadequate performance as a furnace operator; inability to accept criticism; lack of loyalty to Kaiser; difficulties Parson might encounter with white subordinates; inability to take orders; and inability to plan well. R., Vol. II, 91-102, 104-116. Parson contests the validity of some of these statements, attacks others as clear indications that he was not promoted because of his activities in attempting to desegregate the plant facilities (the lacked "loyalty" to the company, criticized the company, and could not "get along" with people); and identifies others as pretexts for racial discrimination. While the District Court Judge clearly has the task of evaluating the credibility of conflicting evidence and witnesses subject to the clearly erroneous rule, e.g., *Bolton v. Murray envelope Corp.*, 5 Cir., 1974, 493 F.2d 191, 193-94, his failure to make any factual findings as to why Parson was not qualified for the position of foreman makes it impossible for the plaintiff to attack or for us to review the result under the proper standard.

The District Court Judge's finding is also tainted by an incorrect understanding of the legal principles applicable to individual claims of racial discrimination in employment. It is clear law in this Circuit and in the Supreme Court that statistics as to the racial composition of the defendant's work force must be considered in judging individual allegations of discrimination. *Dothard v. Rawlinson*, 1977, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786, 798; *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396, 417; *McDonnell Douglas Corp. v. Green*, 1973, 411 U.S. 792, 805, 93 S.Ct. 1817, 36 L.Ed.2d 668; *Peters v. Jefferson Chemical Co.*, 5 Cir., 1975, 516 F.2d 447, 450-51, *Burns v. Thiokol Chemical Corp.*, 5 Cir., 1973, 483 F.2d 300, 306. Parson presented evidence showing a marked disparity between the number of black hourly employees and the number of black foremen at the time he sought his promotion. The three black foremen employed at that time were restricted to the supervision of janitors, a situation that did not change until the next year. There is no mention of these figures in the District Court's findings or conclusions, leaving us with no assurance that the evidence was accorded the probative value it was due. Indeed, the Judge's statement that "other black men have been made foreman" indicates that he gave little, if any, weight to the evidence of statistical disparities. Moreover, the two individuals the Trial Court Judge identified as black supervisors were appointed in 1969 and 1973—long after Parson applied for and was denied a promotion.

Finally, we agree with Parson's contention that the District Court Judge erred in ignoring the impact of the procedure for awarding promotions that was in effect at the time Parson's application was denied. The Judge found that "[t]he process for the selection of a foreman...is

untainted by any overtones of racial discrimination." However, the process described in the finding does not correspond to that in effect in 1966, but rather to the procedure as revised in 1972.[22] At the time Parson made his request, Kaiser gave shift foremen veto power over any applicant; required each applicant to take two written tests; and specified no substantive criteria for guiding selections.[23] The procedure in effect at the time relevant

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[22] The District Court Judge found that:

> The process for the [selection of a foreman] by Kaiser is untainted by any overtones of racial discrimination. Although the post of foreman is not controlled by the Collective Bargaining Agreement, as vacancies occur they are posted on the plant bulletin board and any employee can initiate, on his own behalf, an application for consideration as foreman. All applications for foreman are considered by a review board. Individuals who have initiated an application are reviewed and evaluated by a Management Committee composed of: the Industrial Relations Superintendent, the Employee's Supervisor, the Departmental Supervisor where the vacancy exists, the plant manager or his designee, and a Black representative.

The procedure described here corresponds to that adopted by Kaiser in 1972.

[23] Jim Cruse, Parson's general foreman, gave the following testimony as to the procedure followed in deciding Parson's request:

> Q. Now, Parsons I take it discussed with you his, that is Parsons, becoming foreman during this period?
>
> A. Right.
>
> Q. When was the first time? I assume it was more than once.
>
> A. Yes. We had several discussions. First time was—first part of June in 66. And one night, as I was leaving, he approached me and said he understood there was a policy on making foreman and he would like to apply for foreman job.... When he came back on the day shift Friday, we talked

to Parson's claim evidences many of the characteristics that we have long held violative of Title VII. In *Rowe v. General Motors Corp.*, 5 Cir., 1972, 457 F.2d 348, 358-59, we found that the following aspects of a promotion procedure were invalid:

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(Footnote 23 continued)

about it and I had been aware of the fact that there was a written policy on foreman selection which had been communicated to me, oh about a month before that.

Q. How long had there been a written policy for foreman?

A. I'd say a month or two.

Q. Prior to that, what was the procedure for becoming foreman?

A. It was essentially the same as what was in the written policy.

Q. What was that?

A. A recommendation was made by a shift foreman to a general foreman on a [man's] performance, or a man had an expressed interest on being foreman, he then made his recommendation to the general foreman and they would discuss and evaluate it and review it with the superintendent...

Q. Alright. Now, you say you would discuss it with him when he came [illegible] on Friday?

A. Right. O.K. so I checked out the—I went back to the policy and reviewed it. And started off from the beginning, where we have the recommendation from the foreman and you get recommendations from previous foremen... . I told his foreman that Parsons had talked to me about it.

Q. Who was this?

A. Jim Saucier [Parson's shift foreman]. And that I wanted him to think about it and make a recommendation... . And the recommendation came in "no". [R. Vol. II., Doc. No. 52C at 11-15.]

(i) The foreman's recommendation is the indispensable single most important factor in the promotion process.

(ii) Foremen are given no written instructions pertaining to the qualifications necessary for promotion. (They are given nothing in writing telling them what to look for in making their recommendations.)

(iii) Those standards which were determined to be controlling are vague and subjective.

(iv) Hourly employees are not notified of promotion opportunities nor are they notified of the qualifications necessary to get jobs.

(v) There are no safeguards in the procedure designed to avert discriminatory practices.

These factors result in "procedures which depend almost entirely upon the subjective evaluation and favorable recommendation of the immediate foreman." They are therefore "a ready mechanism for discrimination against Blacks." *Id.*, at 359; *see also, Jenkins v. Caddo-Bossier Assoc. for Retarded Children*, 5 Cir., 1978, 570 F.2d 1227, at 1229; *Pettway v. American Cast Iron & Pipe Co.*, 5 Cir., 1974, 494 F.2d 211, 239-41. The District Court Judge clearly erred in judging Parson's individual claim as if his promotion request had been processed under a procedure adopted six years later. We remand for a reevaluation under the standards that existed in 1966.

*B. Discrimination Against The Class: Promotions To Foreman*

The District Judge found that:

> the evidence quite clearly demonstrated that blacks occupy many salaried positions at the Chalmette Works. There was no evidence indicating any present effects of any past discrimination which may have existed and the evidence relating to the selection process for foreman currently in operation at the Chalmette Works revealed no obstacles, overt or subtle, which prevent blacks from being promoted to the position of foreman. In fact, the very selection process that permits an individual to initiate his application for foreman and to be reviewed by a diversified Selection Committee contains appropriate safeguards to insure that blacks will be given consideration equal to that of whites.

On the basis of this finding, the Judge concluded that Kaiser had not discriminated against the class in the selection of foremen since the effective date of Title VII. In so holding, the Judge ignored the continuing effects of the pre-1972 procedures for the selection of foremen; ignored the statistics relied on by the plaintiff to document these effects; and ignored testimony as to individual instances of discrimination. The incorrect legal foundation for the Court's finding requires us to reverse and remand.

We have already described the procedures for selecting foremen at Kaiser and some of the similarities between the procedures used prior to 1972 and those condemned in *Rowe*. After the effective date of Title VII, Kaiser's method of selecting foremen granted veto power to immediate supervisors, provided hourly employees little information as to the necessary qualifications for promotion; provided those making the decisions no written standards or criteria for guidance; incorporated a personnel test since found discriminatory in impact in a number of Title VII cases,[24] and provided

[24] *See, e. g., Griggs v. Duke Power Co.*, 1971, 401 U.S. 424, 91 S.Ct.

insufficient safeguards for avoiding the influence of discrimination. In 1972, on "the eve of trial," *Rowe v. General Motors Corp.*, 457 F.2d at 359, Kaiser did alter its promotion procedures in ways that promise to mitigate the likelihood of discrimination. However, as we have noted before, "actions taken in the face of litigation are equivocal in purpose, motive and permanence," *James v. Stockham Valves & Fittings Co.*, 5 Cir., 1977, 559 F.2d 310, 325 n.18, *cert. denied*, 1978, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781, quoting *Jenkins v. United Gas Corp.*, 5 Cir., 1968, 400 F.2d 28, 33, and do not redress the grievances of those injured by the previous practices.

While the 1972 revisions of the selection procedure are laudable, we do not find sufficient evidence in the record to convince us that these procedures are not discriminatory in operation, although fair in form. The record does not clearly describe the contents of the evaluation form used in the selection process,[25] and testimony

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(Footnote 24 continued)
849, 28 L.Ed.2d 158; *Johnson v. Goodyear Tire and Rubber Co.*, 5 Cir., 1974, 491 F.2d 1364.

[25] The following testimony was given concerning the evaluation form:

> Q. (By Mr. Douglas) Is there some basic standard that governs your determination as to whether a man will or will not be made a foreman?
>
> A. I would have to say there are some basic considerations. It starts all the way from a man's absentee record, safety record, his quality to work as evidenced by either a lack or in fact proof of reprimand or counselings due to poor workmanship or inability to get along with fellow workers or things of this nature. The individual's apparent ability to communicate or converse, be understood, his manner, his apparent desire to be foreman....

as to the weight accorded the different criteria specified indicates that they may remain susceptible to the exercise of great discretion.[26] On remand, the District Court should

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(Footnote 25 continued)

Q. Are these requirements documented anywhere?

A. I believe there's a form that we check off which I think is available in personnel.

Q. It's available to whom?

A. To the members of the committee who are evaluating the individual.

* * * * * *

Q. Are those the essential qualities that you would look for before you would endorse a man for the job of foreman?

A. I'm trying to indicate here that leadership, which is hard to find, is involved in there, but it is pretty hard to define. But, yes, I believe those are the qualifications that I would look for.

[R., Vol. VIII, Doc. No. 187 at 72-73, 76.]

[26] The following testimony was given concerning the weight given the constituent factors:

Q. Is there any flexibility, or how is a man rated, for example, on the chart? Is there a quality of points given?

A. No, it isn't that statistically designed. It's a question of mostly yes or no type of questions.

Q. Give me an example?

A. Well, is there any evidence this individual has character stability, yes or no. Is he able to communicate properly, yes or no. This type of thing.

Q. Is there any grade?

A. One through ten, that type of thing?

Q. Yes.

determine whether the evaluation method places undue reliance on general character traits, such that complete subjectivity remains likely. *See Wade v. Mississippi Cooperative Extension Service*, N.D.Miss., 1974, 372 F.Supp. 126, *aff'd in relevant part*, 5 Cir., 1976, 528 F.2d 508.

The District Court's evaluation of the likelihood of injury suffered by members of the class by the pre-1972 promotion procedures was a finding that "blacks occupy many salaried positions" at the plant. This ignores the statistical context provided by the plaintiff. We have sketched the disparities between the numbers of black hourly and black salaried-employees, and between black and white salaried employees.[27] The paucity of black foremen and the concentration of blacks in nonsalaried positions constitute a substantial statistical discrepancy that could alone establish a prima facie case of unlawful racial discrimination. *International Brotherhood of Teamsters v.*

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(Footnote 26 continued)

A. No.

Q. Is there a specific number of qualities that he must possess before he passes or fails?

A. Not really. At the end of the form, which is really an interview form, you have a place where the concensus of the committee is should be considered or should not be considered... .

[*Id.* at 80-81.]

[27] Plaintiff was unable to provide record data with which to estimate turnover among foremen after 1965. However, proof of turnover is not part of a prima facie case of discrimination. Rather, the defendant has the burden of proving a lack of turnover to justify a failure to hire minorities. *Pettway v. American Cast Iron Pipe Co.*, 5 Cir., 1974, 494 F.2d 211, 233.

*United States*, 1977, 431 U.S. 324, 339, 97 S.Ct. 1843, 1856, 52 L.Ed.2d 396; *James v. Stockham Valves & Fittings Co.*, 5 Cir. 1977, 559 F.2d 310, 329; *Wade v. Mississippi Cooperative Extension Service*, 5 Cir., 1972, 528 F.2d 508, 516-17; *United States v. Jacksonville Terminal Co.*, 5 Cir., 1971, 451 F.2d 418, 442, 446, *cert. denied*, 1972, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815.[28] Moreover, the statistical patterns do not complete the plaintiff's case. In addition to Kaiser's use of invalid procedures through 1972, the acknowledged presence of pre-Act discrimination, and the statistical discrepancies, Parson presented testimony by individuals of their experiences under these procedures. As the Supreme Court noted in *Teamsters, supra*, 431 U.S. at 339, 97 S.Ct. at 1856, "[T]he individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life."[29]

We conclude that the plaintiff's evidence of racial disparities in promotions to foreman after 1965, the exclusion of blacks from such positions prior to 1965, subjectively based promotion decisions by white supervisors after 1965, and the testimony by individual class members of discrimination they suffered, make a *prima facie* case of discriminatory practices in the selection of foremen. The District Court Judge erred in dismissing this aspect of

[28] This Court has observed that the significance of statistical disparities between the races "is magnified when appraised in light of the fact that [the defendant's decision on promotions are]...almost exclusively a subjective determination made by white supervisors." *Bolton v. Murray Envelope Corp.*, 5 Cir., 1974, 493 F.2d 191, 195.

[29] *See, e.g.*, the testimony of Roosevelt Jackson, Ronald King, and Isadore Booker, concerning their attempts to secure promotions to supervisory positions. [R., Vol. VI, Vol. VII.]

plaintiff's case.[30] On remand, the "onus of going forward with the evidence and the burden of persuasion" is now on *Kaiser. James v. Stockham Valves & Fittings Co., supra,* 559 F.2d at 331; *United States v. Hayes International Corp.,* 5 Cir., 1972, 456 F.2d 112, 120.

*C. Discrimination Against The Class: Interdepartmental Transfers*

Plaintiff's appellant attack on the transfer system at the Chalmette plant is focused on the requirement that employees transferring to another department must enter at the lowest level job in the new department, with a likely accompanying reduction in pay.[31] The District Court Judge made the following findings as to the present system governing transfers:

[T]his court finds that the seniority system

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[30] Kaiser asserts that even if the plaintiff has established a prima facie case as to any claim, more is necessary to withstand a Rule 41(b) motion for involuntary dismissal. Under the standard urged, the trial judge should "evaluate the evidence without making special inferences in the Plaintiff's favor...and [should] resolve the case on the basis of preponderance of the evidence." *Emerson Electric Co. v. Farmer,* 5 Cir., 1970, 427 F.2d 1082, 1086.

We agree that Rule 41(b) allows a trial judge to make findings of fact at the close of a plaintiff's case. However, this does not respond to the flaw in the findings of fact before us here. Because the Judge applied incorrect legal principles, we are unable to credit the fact findings that were made. Kaiser's argument does not remove the necessity for a remand.

[31] Plaintiff relies on Kaiser's 1970 Seniority List, Plaintiff's Exhibit 19, to show examples of blacks who have high seniority in the non-production departments to which they were discriminatorily assigned during the 1950s. These employees hold jobs that pay at a higher rate and require less arduous manual labor than the entry jobs in the production departments.

employed by Kaiser does not "limit the employment and promotional opportunities of Negro employees" nor does Kaiser deny "Negro employees the same rights of transfer."

Although there was some testimony to the effect that blacks were excluded from some departments in the early 1950's, it was shown that by 1956, black employees had begun to transfer to almost every department at the Chalmette Works. There was also uncontroverted evidence that plant seniority was established for all purposes within the production departments by 1962 and that the same principle was applied in the craft departments by 1965. It was further shown that the seniority system in effect since 1962 allowed any employee to bid for a vacancy within his department on the basis of his total continuous plant seniority. It was further shown that, although there are lines of progression in the various departments, an employee is not required to bid up the line job by job, but rather he may bid to any job in the department for which there is a vacancy and in so doing may move around other employees who are junior to him by plant seniority. It was further shown that an employee wishing to transfer between departments, who is a successful bidder, enters the new department for a 10-day trial period and if he decides that he does not like the department or the job to which he has transferred, he has a right to return to his former job without losing any seniority. On the other hand, if he wishes to stay in the new department, after expiration of ten day period, the employee is free to bid on the basis of his qualifications and plant seniority on any vacancy in that department. The evidence established beyond a doubt that many black employees have taken advantage of these transfer opportunities and have rapidly advanced to higher paying jobs.

This Court finds that the method of transfer from department to department at the Chalmette Works does not discriminate against the class. This Court further finds that there is no loss in an employee's seniority as a result of his transferring between departments and that there is full plant seniority carryover on all such transfers. It should also be noted that a substantial number of black employees, who testified at the trial, had reached the top jobs in their respective departments prior to the passage of the Civil Rights Act of 1964. Such evidence clearly illustrates that the seniority system, as developed through the collective bargaining process, does not now nor did it historically exclude blacks or other employees from utilizing their plant seniority for transfer and promotion at the Chalmette Works.

The Judge's findings as to the role of plantwide seniority are not challenged here. We recognize that the relatively early adoption of plantwide seniority that is carried with an employee who transfers between departments places Kaiser's system above many that we have seen in this Court. *E.g., James v. Stockham Valves & Fitting Co.*, 5 Cir., 1977, 559 F.2d 310, 317. However, we do not believe that the trial judge adequately responded to the plaintiff's assertion that the ten-day bottom entry requirement hampered the advancement of black employees from the laborer positions to which past practices once restricted them. We therefore reverse and remand.

The difficulty with the bottom entry requirement is that the transferring employee must remain in the spare or lowest position for ten days *or* until a vacancy in a higher job becomes available. Such a vacancy may arise within twelve days after the transfer. The discriminatory vice rests in the danger that a vacancy may not arise for

months, or even years. We have held that similar plans that restrict transfer to entry level jobs and limit advancement to upper level jobs to persons already in the department are invalid. *See United States v. Hayes International Corp.*, 5 Cir., 1972, 456 F.2d 112, 117. Such a system gives the old seniority criterion a continuing discriminatory effect; blacks are kept at a disadvantage begun by the past practices that kept them out of the nonlaborer departments. Because the ten-day period in the spare position is a minimum rather than a maximum requirement, it does not sufficiently distinguish Kaiser's system from those we have found defective. We hold that the District Court's finding is based on a mistaken understanding of what constitutes the "present effects of past discrimination," and cannot stand.

Kaiser and the Union attempted to justify the bottom entry requirement by arguing that it trains transferring employees and allows them an opportunity to determine if they wish to remain in the new department. [R., Vol. IX, Doc. 191, at 113 (testimony of Kaiser's Industrial Relations Superintendent). This argument invokes the so-called business necessity justification, which "except[s] those few employment practices, which are *non-intentionally* discriminatory or neutral, but perpetuate the consequences of past discrimination, because of their overriding business necessity." *Pettway v. American Cast Iron Pipe Co., supra*, 494 F.2d at 244 [emphasis in original].[32] However, this

[32] *See also, Griggs v. Duke Power Co.*, 1971, 401 U.S. 424, 431-32, 91 S.Ct. 849, 28 L.Ed.2d 158; *Local 189, United Papermakers & Paperworkers v. United States*, 5 Cir., 1969, 416 F.2d 980, *cert. denied*, 1970, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100; *United States v. Jacksonville Terminal Co.*, 5 Cir., 1971, 451 F.2d 418, 453, *cert. denied*, 1972, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815.

doctrine is very narrow. A practice which is demonstrably discriminatory in impact must:

> not only *foster* safety and efficiency, but must be *essential* to that goal. *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), cert. denied, 406 U.S. 906, 92 S.Ct. 1607, 31 L.Ed.2d 815 (1972). In other words, there must be no acceptable alternative that will accomplish that goal 'equally well with a lesser differential racial impact.'

*Id.*, at n.87. In evaluating Kaiser's argument, the District Court Judge did not give sufficient consideration to whether the bottom entry requirement met this standard. On remand, this assessment must be made.

A Union is jointly liable with the employer for discrimination caused in whole or in part by the provisions of a collective bargaining agreement. *See Carey v. Greyhound Bus Co.*, 5 Cir., 1974, 500 F.2d 1372; *United States v. United States Steel Corp.*, 5 Cir., 1975, 520 F.2d 1043 *cert. denied*, 1976, 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77. The transfer and bidding policies that we find deficient were part of the Supplement Seniority Agreement between Kaiser and the Union. [Appendix, Vol. II, at 288-292.] As the representative of the black employees, the Union is charged with the duty of protecting them from invidious treatment. "[I]t would be difficult to fasten laibility on one party to the labor contract which was a substantial cause of the discriminatory employment practices and grant total immunity from such liability to the other party." *Johnson v. Goodyear Tire & Rubber Co.*, 5 Cir., 1974, 491 F.2d 1364, 1381. Any monetary liability imposed upon the employer must be shared by the Union. *See Albemarle*

*Paper Co. v. Moody*, 1975, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280; *United States v. United States Steel Corp.*, 5 Cir., 1975, 520 F.2d 1043; *Myers v. Gilman Paper Co.*, 5 Cir., 1977, 544 F.2d 837, *modified*, 556 F.2d 758, *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59.

*D. Entry Into Craft Positions*

After the plaintiff presented evidence as to the requirements conditioning entry to the crafts and the racial composition of the craft categories, the District Court found that: the testing procedures had been eliminated in 1968 and no evidence suggested "that but for the use of the tests prior to 1968, any member of the class would have obtained a higher paying position"; "the requirement that applicants for crafts positions possess some experience does not discriminate against the class"; and no evidence showed that Kaiser's "methods of training discriminated against the class." Because the District Court failed to consider critical aspects of plaintiff's evidence and applied incorrect legal principles, these findings must also be reversed.

The District Court Judge again appears to have ignored the statistical evidence. The plaintiff presented figures showing that in 1973, less than 3 percent of Kaiser's craftsmen were black. These numbers, when placed against the information as to the percentage and number of blacks among the hourly employees, are entitled to critical, if not dispositive weight, in assessing whether plaintiff has shown a prima facie case of discrimination. The plaintiff's argument is that these statistics demonstrate that Kaiser's practices with regard to selection of craftsmen contain elements of present discrimination and facially neutral policies that perpetuate past bias in hiring for craft positions.

Several of the incidents of past bias are recent—use of the Wonderlic Test through 1968, a written test until after 1968, and the requirement of a high school diploma. The practice challenged here is the requirement of prior industrial experience. Under Title VII, practices and procedures "cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs v. Duke Power Co.*, 1971, 401 U.S. 430, 91 S.Ct. 879, 853, 28 L.Ed.2d 158. "If an employment practice which operates to exclude Negroes cannot be show to be related to job performance, the practice is prohibited." *Id.*, 401 U.S. at 431, 91 S.Ct. at 853. The statistical evidence, with the testimony by individual members of the class as to obstacles they encountered in seeking entry to the crafts, requires the conclusion that the plaintiff made a prima facie showing that the current system, with its prior experience requirement, is discriminatory in effect. Kaiser therefore has the burden of showing that the prior experience requirement has "a manifest relationship" to the legitimate needs of the craft positions.[33] *Griggs v. Duke Power Co., supra*, 401 U.S. at 432, 91 S.Ct. at 854; see also *United States v. Jacksonville Terminal Co.*, 5 Cir., 1971, 451 F.2d 418.

The plaintiff also challenged the District Court's dismissal of the claim of discrimination with regard to training programs for the crafts. At the time of trial, Kaiser imposed testing and educational requirements on applicants to the training programs, requirements which

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[33] An argument based on business necessity to validate the prior experience requirement in spite of differential effects on blacks and whites must meet rigorous standards. *See Watkins v. Scott paper Co.*, 5 Cir., 1976, 530 F.2d 1159, 1168, 1179-83, *cert. denied*, 429 U.S. 861, 97 S.Ct. 163, 50 L.Ed.2d 139; *Pettway v. American Cast Iron Pipe Co.*, 5 Cir., 1974, 494 F.2d 211.

presumptively account for the disparities between the number of black and white craft trainees. Again, this is sufficient to give Kaiser the burden of showing that these eligibility requirements are justified by the needs of the programs. *Pettway v. American Cast Iron Co., supra.* The District Court erred in dismissing this claim.

*IV. Remedies*

We have held that the District Court erred in dismissing the individual and class claims at the close of the plaintiff's case. On remand, the Trial Judge must determine the best method of completing the proceedings. However, the defendants should be allowed to present their evidence, and the District Court should give the plaintiff an opportunity to supplement the present record, in chief or by rebuttal, without being required to offer again the evidence already introduced.[34]

Because of the likelihood that practices may have altered since this case was first tried, and because the law has also changed, the District Court on remand must reexamine the evidence in light of the present law allocating burdens of proof in individual and class claims of employment discrimination in determining the existence of liability and the scope of necessary relief. However, the District Court must remain conscious that while Kaiser's recent affirmative action programs and modifications in past practices will clearly shape the nature of any prospective, injunctive relief,[35] they do not absolve Kaiser or the Union

[34] For a general discussion on retrial after a reversal of a Rule 41(b) dismissal following the plaintiff's case-in-chief, see *Riegel Fiber Corp. v. Anderson Gin Co.*, 5 Cir., 1975, 512 F.2d 784, 793.

[35] In the recent case of *Weber v. Kaiser Aluminum & Chemical*

of liability for the injuries suffered by members of the class from the continuing impact of past discrimination. As we have clearly held, "[o]nce a court has determined that a plaintiff or complaining class has sustained economic loss from a discriminatory employment practice, back pay should normally be awarded unless special circumstances are present." *Pettway v. American Cast Iron Pipe Co.*, 5 Cir., 1974, 494 F.2d 211, 252-53; *Albemarle Paper Co. v. Moody*, 1975, 422 U.S. 405, 413-425, 95 S.Ct. 2362, 45 L.Ed.2d 280; *Johnson v. Goodyear Tire & Rubber Co.*, 5 Cir., 1974, 491 F.2d 1364, 1380.[36]

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(Footnote 35 continued)
*Corp.*, 5 Cir., 1977, 563 F.2d 216, for example, this Court considered a 1974 plan altering Kaiser's entry requirements for craft training positions in an affirmative attempt to recruit blacks into the crafts. In that case, indeed, this Court found that Kaiser went too far in its efforts to increase the number of blacks in skilled positions, resulting in a plan that violated Title VII by imposing a hiring quota of a minimum number of blacks in a plant where no prior discrimination could be shown.

[36] *See Baxter v. Savannah Sugar Refining Corp.*, 5 Cir., 1974, 495 F.2d 437, 443-44, *cert. denied*, 1974, 419 U.S. 1033, 95 S.Ct. 515, 42 L.Ed.2d 308, for a description of the bifurcated burden of proof procedure followed in Title VII claims for class-wide back pay:

> [a] Title VII class action suit presents a bifurcated burden of proof problem. Initially, it is incumbent on the *class* to establish that an employer's employment practices have resulted in cognizable deprivations to it as a class. At that juncture of the litigation, it is unnecessarily complicating and cumbersome to compel any particular discriminatee to prove class coverage by showing personal monetary loss. What is necessary to establish liability is evidence that the *class* of black employees has suffered from the policies and practices of the particular employer. Assuming that the class does establish invidious treatment, the court should then properly proceed to resolve whether a particular employee is in fact a member of the covered class, has suffered financial loss, and thus [is] entitled to back pay or other appropriate relief.

*See also Sagers v. Yellow Freight System, Inc.*, 5 Cir., 1976, 529 F.2d

Plaintiff also claims that the appropriate remedies for discrimination in transfers and promotions are those designed to place the black employee in the position he would have occupied but for the discrimination suffered—that is, his "rightful place."[37] We agree that this comports with the "make whole" approach of Title VII. Because of the early termination of the proceedings below, the District Court did not consider whether such remedies were necessary. On remand, the District Court is directed to consider the "rightful place" theory, particularly with regard to the plaintiff's complaint concerning the transfer system, in determining the need for and the scope of relief.

REVERSED and REMANDED.

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(Footnote 36 continued)
721, 734; *Sabala v. Western Gillette, Inc.*, 5 Cir., 1975, 516 F.2d 1251, 1255; *United States v. United States Steel Co.*, 5 Cir., 1975, 520 F.2d 1043, 1053-55.

[37] Under that theory [the rightful place theory] blacks are assured "the first opportunity to move into the next vacancies and positions which they would have occupied *but for* wrongful discrimination and which they are qualified to fill." *United States v. Georgia Power Co.*, 5 Cir., 1973, 474 F.2d 906. Thus blacks confined by discrimination to certain positions must be given the opportunity to transfer into the formerly "white" positions as vacancies occur in order to assume their "rightful place."

*Pettway v. American Cast Iron Pipe Co., supra*, 494 F.2d at 248; *Sagers v. Yellow Freight System, Inc.*, 5 Cir., 1976, 529 F.2d 721, 730-31 (to be eligible for back pay, there is no need for a class member to have previously applied for a transfer "to positions that [he] reasonably knew to have been closed to [the] class.")

## APPENDIX "E"

**Harris A. PARSON,**

**Plaintiff-Appellant,**

v.

**KAISER ALUMINUM & CHEMICAL CORP., and Local 13000, United Steelworkers of America, AFL-CIO, CLC,**

**Defendants-Appellees.**

No. 74-3468

United States Court of Appeals,
Fifth Circuit

Nov. 1, 1978.

Appeal was taken from an order of the United States District for the Eastern District of Louisiana, Fred J. Cassibry, J., dissmissing individual and class claims of racial discrimination in employment. The Court of Appeals for the Fifth Circuit, 575 F.2d 1374, reversed and remanded. Upon petition for rehearing and petition for rehearing en banc, the Court of Appeals for the Fifth Circuit held that: (1) ten-day bottom entry requirement, within system of interdepartmental transfers set out in collective bargaining agreement, under which employees could use plant seniority to bid for jobs in new department only if they were willing to take risk of being frozen in entry level position with lower pay for indefinite time because some employee already in new department and with more plant seniority might bid for vacancy after required ten-day waiting period, was not a seniority rule but rather was

condition upon transfer extraneous to prevailing seniority system and, as such, was not immunized, under Title VII of Civil Rights Act of 1964, as a basis for liability as a seniority system that preserved the effects of past discrimination so long as an intent to discriminate is not entered into negotiations, genesis, or maintenance, and (2) a union has a major operational responsibility for transfer rules established by collective bargaining agreement and, in civil rights racial discrimination in employment case, the attribution of liability and the apportionment of damages as between employer and union must be approached on flexible basis with regard to comparative equities as seen within court's discretion.

Petition for rehearing and rehearing en banc denied.

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Nils R. Douglas, New Orleans, La., Richard B. Sobol, Anne P. Buxton, Washington, D.C., for plaintiff-appellant.

Carl J. Schumacher, Jr., New Orleans, La., Robert J. Allen, Jr., Kaiser Center, Oakland, Cal., for Kaiser Aluminum, etc.

Jerry L. Gardner, Jr., New Orleans, La., for Local 225.

Alfred D. Trehene, Washington, D.C., Donald R. Mintz, New Orleans, La., John C. Falkenberry, Birmingham, Ala., Burk & Burk, New Orleans, La., Michael H. Gottesman, Washington, D.C., for defendants-appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion July 10, 1978, 5 Cir., 575 F.2d 1374)

Before BROWN, Chief Judge, THORNBERRY, Circuit Judge, and MILLER*, Associate Judge.

PER CURIAM:

In their petitions for rehearing and rehearing en banc in this Title VII racial discrimination suit, the employer (Kaiser Aluminum & Chemical Corp.) and the union (Local 13000, United Steel Workers of America, AFL-CIO, CLC) assail the decision and opinion of the panel, 575 F.2d 1374, on a number of points. We fully adhere to our decision, but feel that clarification of our original opinion is desirable with respect to two of those points.

(1) Contrary to the assertion of Kaiser and the Union, we are fully aware that the decision of the Supreme Court in *International Brotherhood of Teamsters v. United States*, 1977, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396, holds that § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), immunizes from liability even those seniority systems that preserve the effects of past discrimination, so long as an intent to discriminate has not entered into their negotiation, genesis, or maintenance. *See* 431 U.S. at 353-56, 97 S.Ct. 1843; *see also Pettway v. American Cast Iron Pipe Co.*, 5 Cir., 1978, 576 F.2d 1157, 1188-92; *James v. Stockham Valves & Fittings Co.*, 5 Cir., 1977, 559 F.2d 310, 349-52, *cert. denied*, 1978, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d

* Associate Judge U.S. Court of Customs and Patent Appeals sitting by designation.

781. None of our findings that plaintiffs had established a *prima facie* case of illegal discrimination rested upon a theory of liability repudiated in *Teamsters*, although our discussion of the system of interdepartmental transfers established by the Kaiser-Union collective bargaining agreement, *see* 575 F.2d at 1387-89, might have been somewhat more explicit in this regard. We did, however, hold clearly and unmistakably that the central problem with the system of interdepartmental transfers was the ten-day bottom entry requirement, the result of which is that employees can use their plant seniority to bid for jobs in a new department only if they are willing to take the risk of being frozen in an entry level position with lower pay for an indefinite amount of time because some other employee already in the new department and with more plant seniority bids for the vacancy after the required ten-day waiting period. While the rules for bidding for vacancies *within* a department are governed by seniority and thus by *Teamsters*, the ten-day bottom entry requirement is not a seniority rule at all. Rather, it is a condition upon *transfer* wholly extraneous to the prevailing seniority system, and, as such, is *not* immunized by § 703(h) and *Teamsters*. *Cf. Pettway, supra*, 576 F.2d at 1193-94.

(2) The Union objects to the suggestion in our original opinion, *see* 575 F.2d at 1389, that if upon remand the District Court finds the *prima facie* illegal transfer system to fail the "business necessity" justification, the Union must share liability for the Title VII violation and contribute to any monetary relief. Although our view is that the Union has a major operational responsibility for the transfer rules established by the collective bargaining agreement, we have previously approached the attribution of liability and the apportionment of damages as between employer and union on a flexible basis with regard to the

comparative equities, *see James, supra*, 559 F.2d at 353-54; *Guerra v. Manchester Terminal Corp.*, 5 Cir., 1974, 498 F.2d 641, 655-56; *Johnson v. Goodyear Tire & Rubber Co.*, 5 Cir., 1974, 491 F.2d 1364, 1381-82, and we do not mean to foreclose the District Court's discretion in this regard.

On remand, the District Court must of course be sensitive to the changes wrought in Title VII law—both with respect to liability and to the scope of relief—in the four years since this case was last before it. We particularly direct attention, in addition to our decision on appeal, to *Teamsters, supra; Franks v. Bowman Transp. Co.*, 1976, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444; *Pettway, supra;* and *James, supra.* But in the midst of jurisprudential change and complexity, the Court should not lose sight of its primary obligation, which is to ensure that the victims of illegal racial discrimination receive the full measure of relief to which the law entitles them.

The petition for rehearing is DENIED and no member of this panel nor Judge in regular active service having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc is DENIED.

## APPENDIX "F"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 67-1257
SECTION "E"

HARRIS PARSON, ET AL

VERSUS

KAISER ALUMINUM & CHEMICAL CORP., ET AL

ORDER

After careful consideration I have decided to and I do hereby recuse myself in this action.

My brother who will be assigned this case and the lawyers and litigants are entitled to know my reasons.

In the eighteen years that I have been a trial judge I have been reversed on numerous occasions and while I, like most judges, do not enjoy the experience, it is usually done in such a manner that the trial judge's integrity is left intact, and he can proceed objectively with the case on remand, if that is necessary.

In this case, which I handled over a period of nine years, the opinions of the panel simply stated that I had completely *ignored* the law *and* the evidence. Such a statement impugns my integrity.

I had almost come to accept the main opinion and mark it down to experience until the Per Curiam decision

was handed down on the petitions for rehearing and rehearing en banc filed by the defendant Kaiser Aluminum & Chemical Corp. and a Local Union of the Steelworkers' Union. As though they were addressing a Judge with a long history of ignoring the rights of blacks and minorities under the law, which is not the case as my record will demonstrate, I was admonished that:

> "in the midst of jurisdictional change and complexity, the Court should not lose sight of its primary obligation, which is to ensure that the victims of illegal racial discrimination receive the full measure of relief to which the law entitles them."

I resent this gratuitous and improper preaching. I have never lost sight of this obligation. It may be that Kaiser Aluminum and the Steelworkers' Union might feel more reassured if the suggestion had included a reminder that our primary obligation is also to dismiss suits brought against Corporations and Unions if they have no merit.

Obviously I can not be sure that I could give either side in this case a fair trial. If I follow the court's instructions, in my zeal to discover some merit in this case I could lean over backwards against the Corporation and Union, which would not be fair to them.

The caustic and inaccurate tone of the reversal simply makes it unlikely that I could be fair and impartial.

New Orleans, Louisiana, this 28th day of November, 1978.

/S/ Signed

UNITED STATES DISTRICT JUDGE

## APPENDIX "G"

**Harris A. PARSON and Arcell Williams**

**v.**

**KAISER ALUMINUM & CHEMICAL CORP., and Local 225, Aluminum Workers International Union, Chalmette, Louisiana**

Civ. A. No. 67-1257

United States District Court,
E.D. Louisiana

Aug. 28, 1980

United States District Court for the Eastern District of Louisiana, dismissed individual and class claims of racial discrimination in employment. The Court of Appeals, 575 F.2d 1374, reversed and remanded. After denial of petition for rehearing, 583 F.2d 132, and on remand, the District Court, Beer, J., held that: (1) employer, which made a good-faith effort with respect to job opportunity and job advancement for blacks and which was confronted by real possibilities of slow-downs, sabotage, and personal confrontations in connection with enforcement of such opportunities, nevertheless failed to meet its burden to show that its business requirements justified otherwise unacceptable employment and promotion practices; (2) where employer, against which prima facie case of racial discrimination in employment was made out, had embarked on extensive affirmative action programs, prospective injunctive relief was unnecessary; however, employer would be responsible for back pay to those who did show that they had been wronged by employer's discriminatory practices; and (3) employer did not meet its burden of showing that its prior

experience requirements had a manifest relationship to legitimate needs of crafts positions and therefore failed to rebut prima facie showing of racial discrimination against members of class of black hourly employees seeking entry into craft positions.

Order in accordance with opinion.

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Nils R. Douglas, New Orleans, La., Richard B. Sobol, Washington, D.C., for plaintiffs.

Carl J. Schumacher, Jr., New Orleans, La., for defendants.

BEER, District Judge.

This case is here on remand. *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir. 1978). The appeal which resulted in this remand followed from orders entered by District Judge Fred J. Cassibry, dated March 29, 1973, and May 23, 1978, dismissing individual and class claims based upon racial discrimination in employment. The Fifth Circuit Court of Appeals reversed and remanded, July 10, 1978. On November 28, 1978, Judge Cassibry recused himself from further consideration of the case, and the matter was, thereafter, realloted to Judge Morey L. Sear. Subsequently (September 12, 1979), this case was reallotted to this section (Section "M"), although this section was not actually activated by the swearing in of a district judge until December 7, 1979.

Thereafter, on December 14, 1979, this court set a preliminary pretrial conference for December 28, 1979. At that conference a final pretrial conference was set for

March 18, 1980, and the trial date was set for April 21, 1980. Notwithstanding defendant's motions to continue, trial commenced as scheduled. After five days of trial (April 21-April 25, 1980), the record was complete and the defendant was given the opportunity to file a post-trial brief by June 15, 1980. Plaintiff was given the opportunity to respond by August 1, 1980. Both have done so within the time limits.

During the course of the trial, the parties entered a stipulation with respect to the "interdepartmental transfer" issue which has removed that issue from the case. *Parson*, at p. 1380. Thus, the three remaining issues here dealt with are: (1) Kaiser's alleged promotion discrimination against Parson; (2) Kaiser's alleged promotion discrimination against a not yet complete or clearly defined class; and (3) Kaiser's alleged discrimination in providing training and opportunities for entry to various craft positions at the Kaiser plant.

This court's pretrial order of March 18, 1980, provides, in accordance with a stipulation by all parties, that the issue of Kaiser's liability would be tried and decided separately from the issue of any remedy or remedies required thereby and further provided that the issue of liability would be limited to a consideration of the period from July 2, 1965 (Title VII commences) to March 1, 1973 (original trial commences).

## FINDINGS OF FACT WITH RESPECT TO ISSUES (1) AND (2)

1. At all times pertinent, Harris A. Parson was an employee of defendant Kaiser at its plant in Chalmette, Louisiana. He is black.

2. By order dated May 23, 1974, the district court (Judge Cassibry) provisionally certified a class comprised of the black hourly employees employed at Kaiser at the time of trial, with the exception of those individuals who 'opted out'' of the class, as listed in Appendix A of the pretrial order.

3. This is an action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and pursuant to § 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981. This court has jurisdiction over the claims under Title VII, pursuant to § 706(f)(3) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(3). Jurisdiction over the action under 42 U.S.C. § 1981 is based on 28 U.S.C. § 1343(4).

4. As a result of stipulations between the parties, the following facts are manifest:

a. The Kaiser Chalmette plant was, at all times pertinent, engaged in the production of aluminum. Kaiser opened the Chalmette works, located in St. Bernard Parish, Louisiana,[1] in 1951. (PTO p. 11.)

b. In 1956, Kaiser commenced the employment of blacks in its production department. (Vol. IX, Doc. 191, p. 13.) Entry into employment in the production department was conditioned upon passage of the Wonderlic Test (dropped in 1968) and upon *departmental* seniority in bidding for advancement, which was changed to *plant* seniority in 1962. (Testimony of Lewis Albright, 4/22/80.)

[1] St. Bernard parish is located south of New Orleans. In 1951, this parish was one of the most segregated and racially divided parishes in Louisiana. That tradition, and many results that are directly or indirectly related thereto, continued, perhaps in diminished intensity, up to and through all times pertinent.

c. Prior to October, 1965, all foremen at the Chalmette works were white. (PTO p. 11.)

d. In July, 1965, there were 209 supervisors at the Chalmette works; all were white. At that time, approximately 15% of Kaiser's 1,873 hourly production workers were black. (PTO p. 11.)

e. Nine blacks were prompted to shift foreman jobs between July 2, 1965, and September 3, 1971. Four of these were assigned to the Building Services Department. (PTO p. 12.)

f. As of September 3, 1971, there were 164 shift foreman at the Chalmette works. Eight were black; four of these foremen were in the Building Services Department. (PTO p. 12.)

g. In September, 1971, approximately 21% of the hourly employees at the Chalmette works were black. (PTO p. 12.)

h. Of the 164 shift foreman positions on September 3, 1971, 56 were appointed after July 2, 1965. (PTO p. 12.)

i. Prior to April, 1966, there were no specific written procedures governing the selection of foreman. (PTO p. 12.)

5. Kaiser's procedures for selecting foreman have changed markedly since 1965. These procedures are summarized in *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d at 1379.

6. Applying the standards used to select a foreman that existed in 1966 (when Parson's first promotion request

was denied), it was necessary for an employee to be recommended by his shift foreman in order to receive further consideration. Thus, the procedure was subjective as to the standards applied by various foreman in recommending production line employees for promotion to the position of shift foreman. Since there was no particular provision for the posting of any noticce of foreman vacancies, or any other specific method to notify employees of a foreman vacancy, there was no accurate method of calling the attention of the production employees to the existence of foreman vacancies. *Parson*, at 1379. By 1967 (the date of Parson's second attempt to become a foreman), "the revised procedure required each foreman to submit the names of those employees who had indicated a wish to be promoted 'but whom the foreman believes do not have the qualifications.' " *Parson*, at 1379. Thus, an employee's application for promotion to a foreman position continued to be conditioned, at least to some degree, upon the subjective judgment of his shift foreman as far as his qualifications were concerned.

7. The following facts are pertinent to Harris Parson:

a. He was first employed at the Chalmette works in 1953. He was hired as a laborer in the Services Department. (PTO stipulation p. 11.)

b. In 154, Parson became a Porter in the Building Services Department. (Vol. X, Parson testimony p. 7.)

c. In 1960, Parson transferred to the Metal Products Department as a "spare." (Vol. X, Parson testimony p. 8.)

d. Between 1961 and 1963, Parson worked at several non-supervisory jobs in the furnace area of the Metal

Products Department. The top-rated non-supervisory job in that department was furnace operator. In March, 1963, Parson sought to become and did, in fact, receive appointment as a furnace operator in the Metal Products Department. He remained at that job through the time of trial. (PTO stipulation p. 11.)

e. In June, 1966, Parson orally applied for a supervisory job as foreman in the Metal Products Department. Several days later, Parson was orally informed by the shift foreman, Jim Cruse, that his application for promotion to foreman had not been affirmatively acted upon and was rejected. (PTO stipulation p. 11.)

f. During this period and at all times pertinent, Parson had, at least to some noticeable extent, sought to involve himself in a leadership role among the black employees at the Kaiser plant in connection with various management-based attempts to eliminate racially segregated facilities at the plant. (Vol. X, Parson testimony pp. 12-32, pp. 46-48.)

g. At the time of Parson's application and rejection for promotion to a foreman job, there were no written standards as to qualifications for promotion to such supervisory positions. (PTO stipulation p. 11.)

8. But for the activities noted above, it is more likely than not that Parson would have, in the ordinary course of Kaiser's business operations, been, at the least, a reasonable prospect for promotion to foreman. The statistics noted above, as well as Parson's individual capabilities measured against the subjective standards for promotion, cited above, which were in effect at the time of Parson's rejection for promotion, support a prima facie

finding that Parson, by August of 1967, would, more likely than not, have obtained at least provisional promotion to foreman. If there had been no racial overtones to be considered and taken into account in his selection and promotion, it is more likely than not that he would have been affirmatively considered.

9. Though Parson's immediate supervisors were justifiably not particularly impressed with Parson's work record, it is apparent that his efforts in his own behalf in seeking promotion were, to some extent, frustrated on the basis of his other activities at the plant. (See June 14, 1966, memo, Def.Exh. 101, p. 135, June 3, 1966, memo, p. 145, and Cruse memo, p. 104.)

10. By 1967, white employees who had considerably less seniority than Parson had been selected as shift forement in the Metal Products Department. (Pl.Exh. 107, p. 4.) Thus, by August, 1967 (the date of Parson's second application for promotion to shift foreman), parson would have been considered for and, more likely than not, subsequently promoted to the rank of foreman but for his activities above noted dealing with integration of the Kaiser facilities.[2]

11. Accordingly, on the basis of the mandate by which this court is governed, the burden shifted to Kaiser

[2] In this connection, it is important to note that Kaiser's reluctance in promoting Parson came not at all from the company's unwillingness to promtoe black employees because of any company-based prejudice. The reluctance was based upon other factors, such as the company's not necessarily misplaced fear that Parson's promotion would trigger a violent and prolonged (and, thus, expensive) reaction on the part of certain white, racially-motivated employees and the basic contention that Parson's absenteeism, etc., formed a questionable basis for eagerness to promote him to a supervisory position.

to show why, subsequent to Title VII, July, 1965, Parson was not promoted to shift foreman.

12. Thus, the focus of the court's consideration of the evidence shifts to a consideration of the business requirements of Kaiser to determine if they have a manifest relation to Parson's failure to achieve promotion. *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977).

13. Kaiser *has* demonstrated valid business practices for the failure of Parson's promotion efforts in his own behalf but has failed to carry the heavy burden of proving that its selection practices as they concerned Parson were *essential* to recognized business goals of safety and efficiency. *McDonnell Douglas Corp. v. Green*, 41 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

14. Though there was existent at all times pertinent a fear on the part of the local Kaiser management officials that partially paralyzed and materially inhibited their ability to make valid operational judgments with respect to their work force, that fear, understandable though it may have been, was not a sufficiently valid basis for their actions vis-a-vis Parson.

15. Problems, both internal and external, which influenced the manner of dealing with the then existent racial situation, both from the standpoint of the work force itself as well as the outside community in which Kaiser was itself located, were intense. Top management at Kaiser was making a good faith effort with respect to job opportunity and job advancement for blacks at Kaiser but was confronted by real possibilities of slow-downs, sabotage and personal confrontations in connection with enforcement of these

opportunities. Even, so, there is evidence of instances of de facto discrimination occasioned by timidness and vacillation resulting from fear and concern for the overall plant operations. This de facto (though unintentional) discrimination is understandable and yet unacceptable. The management at Kaiser was understandably concerned about the reaction of its predominantly white labor force to the employment of black foreman and, because of this, was inclined, at least during the early and middle stages of this dilemma, to require greater abilities on the part of blacks seeking promotion than their white counterparts. Such misplaced concern seemed to be the case with respect to Isadore Baker, who, in the spring of 1967, probably had the requisite qualifications for promotion but, nevertheless, discovered that more was required of him because of his race and the closely related volatile situation that existed at the Kaiser plant. (Vol. VII, Doc. 183, p. 15.)

16. The same may be said to be true of Parson, who was neither an exceptionally well qualified nor a clearly unqualified furnace operator at the times pertinent. He was average. Perhaps his motivation and company loyalty were somewhat below average and perhaps his basic understanding of furnace operations (at least from the standpoint of length of actual experience with furnace operations) were somewhat above average. Perhaps the promotion to foreman of Parson, who had been both outspoken about and physically involved in Kaiser's own good faith efforts to commence a program of plant desegregation, could have been precipitous in a plant where racial tensions clearly existed. Even so, and acknowledging this court's incalculable advantage of looking back instead of being there on the firing line at the critical times here involved, it is the court's ultimate determination that Parson's promotion to foreman would, more likely than not, have come to pass by

August of 1967 but for all of the problems above described. Very real problems confronted Kaiser, and that company can neither be censured nor greatly criticized for the methods which they then chose to deal with these problems. Nevertheless, their overall response visited a burden on Parson's quest for promotion that was sufficiently disproportionate as to require a basic finding that they have not carried the burden imposed by the reviewing court in this case.

17. Further, that burden has not been sufficiently met with respect to the yet fully defined class. Even so, this observation is, I believe, necessary:

It borders on practical impossibility for any adjudicatory agency (special master, judge, magistrate) to fairly reconstruct the "but for" status of various informal applicants for foreman promotions during the critical time period with which we are here concerned. Yet, those complex issues are for another part of these proceedings and certainly for another day in view of the stipulation limiting the present focus to a determination of liability.

## FINDINGS OF FACT WITH RESPECT TO ISSUE (3)

1. Kaiser's Chalmette Plant is involved in a complex manufacturing process requiring employees who are skilled in many and varied crafts to maintain it on a daily operational basis. During the period July, 1965 to March, 1973, over 450 craftsmen were employed in two Kaiser maintenance departments known as Power Maintenance and Reduction Maintenance. The craft positions in Power Maintenance were: electrician, instrument repairman, lagger, lineman, machinist, mechanic, painter and welder.

The craft positions in Reduction Maintenance were: air conditioning mechanic, automotive mechanic, blacksmith, bricklayer, carpenter, electrician, machinist, mechanic, painter, welder A and welder B. (PTO.)

2. Though various definitive steps had been taken by Kaiser to achieve integration of the physical facilities at the Chalmette Plant by 1965, a somewhat less effective and forceful campaign was instituted by Kaiser to bring qualified blacks into craft positions. That campaign, commenced in the 1967-196° period did include such activities as placing recruiting ads in local papers, seeking referrals from within the plant, soliciting help from the Urban League, talking to outside agencies and contacting the unions (Testimony of Richard Humphrey, Kaiser trial, 4/21/80; Ronald Radocovich, Kaiser trial, 4/21/80; Frank Krause, Kaiser trial 4/22/80), but it was not very effective insofar as practical results were concerned.

3. In July, 1965, there were approximately 460 persons employed at the Chalmette Plant in the various craft positions. Three of these positions were filled by blacks. (PTO, uncontested fact, 7q., p. 12, March 18, 1980.)

4. As of July, 1970, there were 468 persons employed in crafts positions at the Kaiser Plant. Eight of these positions were filled by blacks. (PTO, compilation of table, pg. 13.)

5. Of the 96 craftsmen in the Power Maintenance Department in July, 1970, 22 were hired after July 2, 1965. One of the 22 was black. (PTO, uncontested fact, 7s., pg. 14.)

6. Of the 365 craftsmen in the Reduction Maintenance Department on July 31, 1970, 65 were hired after July 2, 1965. Three of these 65 were black. (PTO, uncontested fact, 7t., pg. 14.)

7. In 1965, applicants for craft positions were required to have a high school diploma and prior industrial experience in order to be considered for the job. Applicants were further required to achieve a passing score on a short basic intelligence test known as the Wonderlic Test. This was a widely used industrial test which was considered to be an easy and accurate way to gauge the potential an applicant had for success at work. (Testimony of John Rome, 4/22/80; testimony of Lewis Albright, 4/22/80.)

8. Craft applicants who met the above criteria would, upon approval of the Maintenance Administrator, John Rome, qualify for a trial work period. Craft-type job applicants from the Chalmette Plant, who were tentatively accepted, then had a 10-day trial period; all other applicants tentatively accepted had a 30-day trial period. (Testimony of John Rome, 4/22/80.)

9. By 1968, use of the Wonderlic Test had been discontinued primarily because a validation study made in 1967 by Kaiser showed there to be a disproportionate passage rate (57% for whites and 28% for blacks), and no clear correlation between passage of the test and either turnover rate or general job performance. The requirement of a high school diploma was dropped a year later. (Testimony of Albright, 4/22/80.)

10. The industrial experience requirement continued in effect through March, 1973. This requirement was incorporated into the selection procedure in written form in

1967. (Testimony of Krause, 4/22/80.)

11. In 1968, the craft applicant selection method was revised. Kaiser commenced using *structured interviews* as a means of evaluating applicants, and craft-type job openings were posted. When posting took place, the senior *qualified* applicant (the senior applicant in terms of employment service with the requisite industrial experience) was, thereupon, interviewed. The structured interviews were conducted by the Maintenance Administrator, John Rome, and sought to bring an objective consideration of an applicant's knowledge regarding a specific craft. The interview was not graded in a traditional sense; it was instead designed to promote a dialogue between the applicant and the test administrator during which the applicant had an opportunity to orally develop the extent of his knowledge in a craft. (Testimony of John Rome, 4/22/80.)

12. Kaiser has affirmatively established that the industrial experience requirement was, on various occasions, waived or reduced for black craft applicants. However, although Kaiser perceived a dearth of qualified black craftsmen, they chose to make their main effort to remedy the problem by extensive recruiting. The lax application of the industrial experience requirement to encourage black entries to crafts positions followed no consistent or announced policy. (Krause testimony, 4/22/80; Rome testimony, 4/22/80; Humphrey testimony, 4/21/80.)

13. In rebuttal, plaintiff's sought to show that craft-type employment applications of many white employees, who, on the face of their applications, had not met the industrial experience requirement, were, nevertheless, hired into craft positions. (Pl.exh. 114-124.) Thus, they contended that the lax application of the industrial experience

requirement hindered more than helped insofar as black applicants were concerned. I do not find this contention to have been proven.

14. Aware that the procedures above described were not achieving positive results with respect to employment of blacks in craft positions, Kaiser also initiated an on-the-job training program as an alternative manner of stepping up the rate of black employee entry to the crafts. This on-the-job training program involved electricians and instrument repairmen and mechanics. The trainee electricians and instrument repairmen were required to have a high school diploma or equivalent in order to participate, and trainee mechanics were required to have finished two years of high school. The program also required applicants to pass a General Aptitude Test administered by the Louisiana State Employment Service. (Pl. exh. 110, Kaiser attachment dated April 24, 1969, describing on-the-job training.)

15. Since the reviewing court had already concluded that the procedures noted above constituted prima facie discrimination, Kaiser, on remand, bore the burden of proving otherwise. (*Parson, supra*, pg. 1390.)

16. Given the appellate court's determination of prima facie discrimination as to these procedures, Kaiser's specific burden was to offset the prima facie conclusion reached by the reviewing court by proving that these requirements had a manifest relationship to the legitimate needs of the crafts positions. (*Parson, supra*, pg. 1390.)

17. I find that Kaiser's various requirements noted above (including prior industrial experience) may well have been necessary to accomplish the ultimate goals of plant

safety and employee welfare in certain of the craft positions. The complexity of the plant and the expertise needed to maintain the plant were such that craft positions of instrument repairman, electrician, machinist and lineman, did, very likely, require fully experienced craftsmen to properly handle the jobs. However, on the hearing on remand, Kaiser has not carried the heavy burden imposed by the reviewing court of *proving* the necessity for these requirements in order to rebut the prima facie proof of discrimination found by the reviewing court. Instead, Kaiser sought to demonstrate that they sometime waived various of the requirements for individual black applicants.[3] Thus, based on the record made herein, I am obliged to conclude that Kaiser has not met their burden of proof in spite of what the court perceives to be a real possibility that they might have done so, at least insofar as several of the craft positions were concerned.

18. Even so, the record indicates that few members of the prospective class have actually shown any individual instance of loss resulting from the procedure followed by Kaiser. The record indicates that a small number of employees who were *helpers* to bricklayers or painters but who did not qualify for craft positions due to a lack of industrial experience as bricklayers or painters probably have a valid claim. However, the court was singularly unimpressed with the testimony of some alleged contenders for such craft positions as instrument repairmen, machinists, electricians, and the like, based upon short-term, spotty attendance at various so-called "schools" of electronics, industrial mechanics, etc. This, however, is not the issue that must, under the mandate of the reviewing court and the pretrial order, be here addressed.

[3] The testimony on this was inconclusive and sketchy. Few, if any, *specific* instances were described.

## CONCLUSIONS OF LAW WITH RESPECT TO ISSUES (1) AND (2)

1. On remand, defendant has not carried its burden of affirmatively rebutting the findings by the reviewing court that a prima facie case has been made out. *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir., 1976); *Parson, supra.* Stated differently, Kaiser has failed to meet its burden of showing that its business requirements have such manifest relation to employment and promotion practices as to form a valid basis for otherwise unacceptable practices. *Dothard, supra.*

2. Prospective injunctive relief is unnecessary. Kaisr has embarked on extensive affirmative action programs. Furthermore, Kaiser's extensive revisions with respect to all aspects of the promotion selection process appear to have obviated the discriminatory practices with which we have been here concerned by eliminating essentially all unacceptable subjective emphasis in the foreman selection procedure.

3. Even so, the far-ranging improvements in Kaiser's employment and promotion practices, though relevant to prospective relief, can not obviate the validity of compensatory relief contentions. Kaiser is responsible to those who can show that they have been wronged. Those who have been wronged have a right to be restored to their rightful economic status absent the effects of unlawful discrimination. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir., 1974). *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir., 1974).

4. Parson, accordingly, is entitled to a proceeding to compute the amount of back pay relief to which he is

entitled from August, 1967, to some specific point in time to be determined in the remedial proceedings. Though it is the court's present view that 1972 marked the end of the period of unacceptable discriminatory practices at Kaiser, that date determination falls more precisely in the domain of the fact finder who will deal with that specific issue, and I certainly defer to his or her judgment on that issue.

5. Back pay relief for members of the class must be awarded based on individual determinations in the remedial proceeding. As stated in *Baxter v. Savannah Sugar Refining Corp.*, 495 F.2d 437 (5th Cir., 1974):

> "...the initial burden will be on the individual discriminatee to show that he was available for promotion and possessed the general characteristics and qualifications which are shown by Savannah to be possessed by the higher paid white employees and are job related. Once this burden is met, the employer must demonstrate by clear and convincing evidence that any particular employee would have never been advanced because of that individual's particular lack of qualifications for a more difficult position or for other good and sufficient reasons such employee would never have been promoted. It is apparent that whether any particular individual would have been advanced under a color-blind system cannot now be determined with 100% certainty. The court on remand will have to deal with probabilities. Any substantial doubts created by this task must be resolved in favor of the discriminatee who has produced evidence to establish a prima facie case. The discriminatee is the innocent party in these circumstances."

6. Even so, it is obvious at *this* time that not every

member of the class is entitled to some award of back pay. Rather, with respect to each potential receipient, an initial showing must be made of economic loss attirbutable to the unlawful practices in order to raise the question of entitlement to an award of back pay. Though "substantial doubt" is to be resolved in accordance with *Baxter*, few, if any, of the prospective class have, at this stage of the proceedings, carried the burden of showing that they possessed "the general characteristics and qualifications" possessed by those who were promoted. This opportunity must be extended, but that burden is, clearly, upon the claiming party.

7. As a matter of law, since *Parson, supra*, is the law of this case, the defendant has failed to rebut the prima facie conclusion mandated by the reviewing court's judgment.

## CONCLUSIONS OF LAW WITH RESPECT TO ISSUE (3)

1. This court's mandate with regard to discrimination in the crafts is summarized in the following passage:

> "The statistical evidence, with the testimony by individual members of the class as to the obstacles they encountered in seeking entry to the crafts, requires the conclusion that the plaintiff made a prima facie showing that the current system, with its prior experience requirement, is discriminatory in effect. Kaiser therefore has the burden of showing that the prior experience requirements has a 'manifest relationship' to the legitimate needs of the crafts positions." *Parson*, at pg. 1390.

2. Arguments based on business necessity to validate prior experience requirements must meet rigorous standards. *Parson, supra; Watkins v. Scott Paper Company, supra.* Business necessity, as required therein, is a strict doctrine interpreted by the Court of Appeals in *Watkins* as follows:

> "the 'business necessity' doctrine must (do)...more than...serve legitimate management functions. Otherwise, all but the most blatantly discriminatory plans would be excused even if they perpetuated the effects of past discrimination...*Necessity connotes an inesistible demand.* To be preserved, (a present employment practice)...must not only directly foster safety and efficiency of a plant, but also be essential to those goals....If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued. Id., quoting *United States v. Bethlehem Steel Corp.*, 2 Cir., 1971, 446 F.2d 652, 662 (bracketed material and emphasis added). See also *Rodriguez v. East Texas Motor Freight*, 5 Cir. 1974, 505 F.2d 40, 56 (quoting *Bethlehem Steel), appeal pending.*"

3. Kaiser has failed to meet the rigorous burden imposed by the reviewing court with regard to the industrial experience requirements needed to gain employment in the crafts. There has not been an evidentiary showing sufficient to meet the relationship requirements of *Watkins, supra,* although I wonder, as a practical matter, if any company, no matter how well intentioned and well motivated, could fully meet such a standard.

4. As a matter of law, since *Parson, supra,* is the law

of this case, the defendant has failed to rebut the prima facie conclusion mandated by the reviewing court's judgment.

5. As stated in the conclusions of law with respect to issues (1) and (2), prospective injunctive relief is unnecessary and the rightful place theory as enunciated in *Pettway v. American Cast Iron Pipe Co., supra*, and *Johnson v. Goodyear Tire & Rubber Co., supra*, should be applied in remedial proceedings. Further, the burden of proof in the remedial proceedings should be consistent with *Baxter v. Savannah Sugar Refining Corp., supra*.

6. Ultimate findings of instances of discrimination in the craft-type job selection process should be limited to those instances where a valid showing of real ability to perform the craft in question is made. As of this time, the record does not support any such *individual* awards except for a very few isolated instances in only two or perhaps three of the craft-type job categories.

## IN GENERAL

As a district judge, I must, of course, follow the law of the case, which, clearly, is *Parson v. Kaiser, supra*.

Though Kaiser's efforts to carry the burden imposed by the mandate on remand were essentially ineffective, disjointed and fell far short of the target, I am obliged to note that Kaiser was confronted—on the basis of the mandate—with an extremely heavy evidentiary burden. I believe it was too heavy under the circumstances. I would hope that a temperate approach might be the order of the day in the application of these findings to the extent that they are used as a basis for sorting out individual claims for back pay or job advancement.

## APPENDIX "H"

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NUMBER 67-1257
SECTION M

HARRIS A. PARSON,

Plaintiff

VERSUS

KAISER ALUMINUM & CHEMICAL CORPORATION,

Defendant.

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OPINION AND JUDGMENT
BY SPECIAL MASTER

Statement of Facts:

Harris A. Parson (hereinafter 'Parson') is the lead plaintiff in this class action suit against Kaiser Aluminum & Chemical Corp. (hereinafter 'Kaiser') instituted in 1967 to seek redress against alleged discriminatory practices in its promotion practices as to black employees.

By judgment, *Parson v Kaiser Aluminum & Chemical Corp.*, 575 F2d 1374 (5th Cir., 1978) discrimination was found and this cause was remanded for trial to establish Kaiser's liabilitly as to (1) Harris Parson; (2) a class of black employees seeking promotion to foreman; and (3) a class of hourly employees alleging discrimination in transfer and entry into various craft positions.

On August 28, 1980, U.S. District Judge Peter Beer rendered a judgment on the issue of Kaiser's liability but in that trial it was stipulated that "the issue of any remedy or remedies required thereby" would be tried and decided separately under Rule 42 (b) of the Federal Rules of Civil Procedure.

Hence, this Stage II proceeding before the Special Master is to determine the nature of the remedy which will place the discriminated employee in the position he would have occupied but for the discrimination suffered.

The second and third issues still are in the intermediate stages of fact finding and judicial resolution and will be dealt with by the Special Master in future decisions.

This opinion, in accordance with the stipulation in the trial proceedings will deal with the "make whole" remedy to which Plaintiff Parson is entitled.

The relief and remedies to which Plaintiff is entitled are derived from Title VII of the Civil Rights Act of 1964, 42 U.S.C. #2000(e), and #1 of the Civil Rights Act of 1866, 42 U.S.C. #1981.

The findings of the two prior trials demonstrated that Harris A. Parson was first employed as a laborer in 1953 in the Chalmette plant; that he became a furnace operator in 1963 and remained so through the entire period of this litigation.

He first applied for promotion to a supervisory position in 1966 and from testimony adduced it was concluded that Parson by the time of a second request in August,

1967 "would have been considered for, and more likely than not,...promoted to the rank of foreman but for his activities dealing with the integration of the Kaiser facilities." (In July, 1966 Parson filed a race discrimination charge with the Equal Employment Opportunity Commission (EEOC) on the basis of Kaiser's refusal to promote him to foreman because of his race. He was granted the right to institute suit by the EEOC in August, 1967 when EEOC found reasonable cause to believe that Kaiser had engaged in discriminatory practices.)

Conclusions of Law:

Parson's participation in EEOC proceedings to challenge practices then in force at the Chalmette plant which he considered discriminatory were protected by Section 704 (a) of Title VII. As such, the District Court decided that a denial of promotion was contrary to the holding in *Pettway v American Cast Iron Pipe Co.*, 411 F2d 998, (5th Cir. 1969) which stands for the principle enunciated:

> "There can be no doubt about the purpose of sec. 704 (a). In unmistakable language it is to protect the employee who utilizes the tool provided by Congress to protect his rights"

Based on the "ultimate determination that Parson's promotion to foreman would...have come to pass by August of 1967", this trier of fact must then apply the applicable remedies.

In *Albemarle Paper Company v Moody*, 422 U.S. 405 (1975), Mr. Justice Stewart considered the findings of a North Carolina district court which largely parallel the findings made by Judge Beer in the instant case. There it

was held that Negro employees had been locked in lower paying jobs by a discriminatory seniority system which violated the Civil Rights Act of 1964, Sec. 706 (g); but the lower court refused to make an award of backpay since it found that the breach of Title VII "had not beenn in 'bad faith'."

Judge Beer found as a fact that Kaiser "has demonstrated valid business practices for the failure of Parson's promotion efforts" and that "it is important to note that Kaiser's reluctance in promoting Parson came not at all from the company's unwillingness to promote black employees because of any company-based prejudice." Nonetheless, Judge Beer concluded that their actions vis-a-vis Parsons "failed to carry the heavy burden of providing that its selection practices as they concerned Parson were 'essential' to recognized goals of safety and efficiency. *McDonnell Douglas Corp. v. Green*, 93 S.Ct. 1817 (1973)."

In the Albemarle Paper case, the Fourth Circuit Court of Appeals overturned the judgment of the District Court and ruled that backpay should have been awarded and could not be denied "merely because the employer had not acted in 'bad faith'." It concluded that a plaintiff or a complaining class who is successful...should ordinarily be awarded backpay unless special circumstances would render such an award unjust. *Newman v Piggie Park Enterprises*, 390 U.S. 400, 88 S.Ct. 964 (1968)."

In discussing the discretionary grant to the Courts of the right to award backpay, Justice Stewart stated:

> "The power to award backpay was bestowed by Congress, as part of a complex legislative design directed at a historic evil of national proportions.

"It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination.... Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination. The terms 'complete justice' and 'necessary relief' have acquired a clear meaning in such circumstances.

"Where racial discrimination is concerned, 'the district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future citing *Louisiana v United States,* 380 U.S. 145, 85 S.Ct. 817 (1965). And where a legal injury is of an economic character, the general rule is that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed citing *Wicker v Hoppeck,* 6 Wall. 94, 18 L Ed. 752 (1867).

"The 'make whole' purpose of Title VII is made evident by the legislative history. The backpay provision was expressly modeled on the backpay provision of the National Labor Relations Act. Under that Act, 'making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces.

"It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy

and making persons whole for injuries suffered -through past discrimination."

*Franks v Bowman Transportation Co., Inc.*, 424 U.S. 747 (8th Cir. 1976) states the measure of award most simply:

> "The Act (Title VII) is intended to make the victims of the unlawful employment discrimination whole, and...the attainment of this objective...requires that persons aggrieved by the consequences and effects of the unlawful employment practices be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination."

In applying this standard and that of the Equal Employment Act of 1972, to the lower court finding of an absence of 'bad faith', Justice Stewart categorically stated:

> "This is not a sufficient reason for denying backpay....This would read the 'make whole' purpose right out of Title VII, for a worker's injury is no less real simply because his employer did not inflict it in 'bad faith'....Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." citing *Griggs v Duke Power Co.*, 401 U.S. at 432, 91 S.Ct. at 854 (1971).

One of the more difficult issues before this trier of fact deals with the period of time or termination date to which Plaintiff Parson is entitled to recover as demonstrated by the cases previously cited.

The Fifth Circuit, Chief Judge Brown in *Parson v Kaiser Aluminum*, 575 F2d 1374 stated:

"In 1972, on the 'eve of trial', *Rowe v General Motors Corp.*, 457 F2d at 359, Kaiser did alter its promotion procedures in ways that promise to mitigate the likelihood of discrimination. However, as we have noted before, 'actions taken in the face of litigation are equivocal in purpose, motive and permanence,' *James v Stockham Valves & Fittings Co.*, (5th Cir., 1977) 559 F2d 310...and do not redress the grievances of those injured by the previous practices."

In setting forth the remedies which the District Court might apply on remand, Judge Brown said:

"However, the District Court must remain conscious that while Kaiser's recent affirmative action programs and modifications in past practices will clearly shape the nature of any prospective injunctive relief, they do not absolve Kaiser...of liability for the injuries suffered by members of the class from the continuing impact of past discrimination. As we have clearly held, 'once a Court has determined that a plaintiff or complaining class has sustained economic loss from a discriminatory employment practice, backpay should normally be awarded unless special circumstances are present.' *Pettway v American Cast Iron Pipe Co.*, (5th Cir., 1974) 494 F2d 211, 252-53; *Albemarle Paper Co. v Moody*, 1975, 422 U.S. 405, 413-425, 95 S.Ct. 2362, 45 L. Ed. 2d 280; *Johnson v Goodyear Tire & Rubber Co.*, (5th Cir., 1974), 491 F2d 1364, 1380.

"Plaintiff also claims that the appropriate remedies for discrimination in transfers and promotions are those designed to place the black employee in the position he would have occupied but for the discrimination suffered—that is, his 'rightful place'. We agree that this comports with

> the 'make whole' approach of Title VII....On remand, the District Court is directed to consider the 'rightful place' theory, particularly with regard to the plaintiff's complaint concerning the transfer system, in determining the need for and the scope of relief.
>
> "Under the 'rightful place theory' blacks are assured the first opportunity to move into the next vacancies and positions which they would have occupied but for wrongful discrimination and which they are qualified to fill. *U.S. v Georgia Power Co.*, (5th Cir., 1973) 474 F2d 906."

On remand, Judge Beer in his August 28, 1980, opinion found that "Prospective injunctive relief is unnecessary." An injunctive order was issued by consent and agreement of all counsel on December 19, 1980, in which procedures for filling future supervisory jobs and craft jobs in a non-discriminatory manner were made the order of the Court. In addition, the Court retained jurisdiction over this action for a period of five years and ordered an annual reporting system by which progress could be monitored.

Backpay Award:

Plaintiff argues that backpay must be allowed an employee "from the time he is unlawfully denied a promotion...until he actually receives it," citing *Patterson v American Tobacco Co.*, 535 F2d 257 (4th Cir., 1976) cert. denied 429 U.S. 920 (1976); *Mims v Wilson*, 514 f2d 106 at 110 (5th Cir., 1975).

Thus, it appears that the termination date for backpay might be fixed in 1972 when the Court found "that 1972 marked the end of the period of unacceptable

discriminatory practices at Kaiser". The instructions on remand of Judge Brown stated that such remedial actions "do not absolve Kaiser of liability for the injuries suffered by...the continuing impact of past discrimination."

A second possible date might be the date on which Judge Beer made his final finding of discriminatory practices and issued his decree on August 28, 1980.

For this Court to award Parson or any other discriminatee the salary to which he would have been entitled had he not been discriminated against (here in 1967 as to Parson) and then to reach a conclusion that revised employment procedures at some future date (here, 1972) require the return to a lower salary (here that of a furnace operator rather than a foreman) does not comport with the "make whole" or "rightful place" theory established and followed almost universally by the Circuit Courts and the Supreme Court in numerous decisions. In *Pettway*, supra, and *U.S. v Georgia Power Co.*, supra, it was held:

> "Under that theory (rightful place theory) blacks are assured 'the first opportunity to move into the next vacancies and positions which they would have occupied but for wrongful discrimination and which they are qualified to fill.' ...Thus Blacks confined by discrimination to certain positions must be given the opportunity to transfer into the formerly 'white' positions as vacancies occur in order to assume their 'rightful place.' A complete decree must give enough relief to insure that the transferred discriminatees are able to *maintain* their rightful place."

Rather than an arbitrary date or the creation of an artificial employment status, this trier of fact is persuaded

by the decisions in *Pettway*, supra, *EEOC v Korn Industries*, 622 F2d 256 (4th Cir., 1981); *Albemarle Paper Co. v Moody*, supra; *Hameed International Ass'n. of Iron Workers*, 637 F2d 506 (8th Cir., 1980) and the instructions on remand in *Parson v Kaiser*, supra, which stand for the proposition that backpay must be allowed from the date of the Title VII violation until the time that the discriminatee actually receives the promotion at issue or compensation in accordance with law.

Indeed, Judge Barrington Parker of the U.S. District Court for the District of Columbia in *McKenzie v Saylor*, in January of 1981, 508 F. Supp. 641 unequivocally held that:

> "Once an individual class member is determined to be entitled to backpay, he shall continue to receive any difference between his current pay and the pay to which he is entitled until he is promoted to his rightful position. A prospective award, or 'front pay' is necessary to make whole those class members wrongfully denied advancement. (citations)...To deny this type of relief to identifiable victims of...discriminatory practices would, in effect, ignore and perpetuate the economic effect of racial discrimination."

This case, it should be pointed out, dealt with proven discriminatory practices of the United States Government Printing Office.

Hence, an award for backpay is made to Harris A. Parson from September 1, 1967, through June 30, 1982, the date of which this matter was submitted to the Special Master for decision which totals the sum of $71,669 as per Table I, attached hereto and made part hereof.

Social Security and Income Tax Computation:

Defendant Kaiser correctly argues that this calculation is based on gross income and that the award of $71,669 should be reduced by an amount allocable to income and social security taxes. Authority for this is found in *Ainsworth v U.S.*, 399 F2d 176 (Ct. Cl. 1968) and *Social Security Bd. v. Nierotko*, 327 U.S. 358 (1946) in which a backpay award under the National Labor Relations Act was deemed "wages" under the Social Security Act.

The methodology for determining the correct tax figures can be made based on previous earnings together with this award which will require a supplemental order based on a factual detemination to be submitted for adjudication to the Special Master so as to comply with FICA and income tax withholding regulations.

Backpay Award Components:

That this award is made up of other components is set forth in *Pettway v American Cast Iron Pipe Company*, supra, (page 263:

> "Finally, the ingredients of backpay should include more than 'straight salary'. Interest, overtime, shift differentials, and fringe benefits such as vacation and sick pay are among the items which should be included in backpay (citations). Adjustment to the pension plan for members of the class who retired...should also be considered."

Interest Calculation:

An issue has been made as to prejudgment interest

as a concommitant award to straight salary in arriving at the "make whole" remedy. Ample authority for the tolling of interest on lost earnings due to a violation of Title VII is contained in *U.S. v Lee Way Motor Freight, Inc.*, 625 F2d 918, 940 (10th Cir. 1979), *Winn-Dixie Stores, Inc. v NLRB*, 413 F2d 1008, 1010 (5th Cir. 1969) wherein it was stated:

> "We think that the only way the employees could be made whole for their loss of earnings was for them to draw interest on the amounts to which they became entitled from the date of their illegal discharge..."

In *Hambree v Georgia Power Co.*, 637 F2d 422, 430 (5th Cir. 1981), it was held:

> "...Plaintiff was deprived reemployment rights explicitly granted to him by Congress. The only way he can be made whole is by awarding him pre-judgment interest."

Varying rates of interest have been suggested as an adjunct to the backpay award and it is conceded that the appropriate rate lies within the judgment of the trier of fact. In cases cited, the Master has observed that there has been no one universal method employed by the Court of Appeals in making this determination nor an agreement on a specific rate of interest to be utilized.

In taking into consideration all of the circumstances of this proceeding and the goal sought to be achieved by the "make whole" remedy, the judgment of the Special Master is that substantial justice will be done by awarding interest to Plaintiff Parson at the Louisiana legal rate of

interest which has prevailed over the many years that this cause has been pending, and more particularly:

> From September, 1967 to July 29, 1970, interest of 5% on the amount of this award;
>
> Interest of 7% from July 29, 1970, to September 11, 1980;
>
> Interest of 10% from September 11, 1980 to September 11, 1981; and
>
> Interest of 12% (the current legal rate) from September 11, 1981 to June 30, 1982, and continuing until payment.

Rather than a compounding of interest on a quarterly or annual basis, it is orderd that the original award together with specified interest be calculated for each period set forth above, and that subsequent interest be calculated on the total sums arrived at on July 29, 1970; September 11, 1980; September 11, 1981; and June 30, 1982.

Fringe Benefits:

The parties do not differ on the right of a discriminatee to have the value of fringe benefits included as a necessary ingredient of the backpay award as espoused in 'Pettway,' supra.

Despite efforts to secure from Defendant Kaiser the necessary data which will allow a mathematical calculation or the value of fringe benefits such as sick pay, hospitalization premiums, pension and retirement benefits such information has not been produced even in response to orders of

the Court. Kaiser has explained this circumstance as being the result of its current economic and personal problems which render the gathering of this information highly difficult.

This award incorporates such "fringe benefit" value as an integral factor in the judgment in favor of Harris A. Parson and reserves for a supplementary order the establishment of such value as may be either agreed to by Counsel or determined on a presentation of the facts. In any event, the Court specifically finds that Harris A. Parson, upon his retirement or separation from his employment at Kaiser, shall be entitled to the pension which he would have received had he been promoted to the position of shift foreman in August, 1967.

Subject to the two matters herein which still require fact-finding this judgment is rendered ordering the payment by Kaiser Aluminum & Chemical Corporation to Harris A. Parson the sum of $71,669 (subject to adjustment for taxes); interest from September 1, 1967 as set forth herein; the value of fringe benefits as shall be determined, and pension rights as of September 1, 1967.

This judgmentis rendered this 7th day of February, 1983.

/S/ Signed

Carol B. Hart
Special Master

## APPENDIX "I"

MINUTE ENTRY
BEER, J,
APRIL 27, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NUMBER 67-1257
SECTION M

HARRIS A. PARSON

VERSUS

KAISER ALUMINUM & CHEMICAL CORPORATION

This class action brought pursuant to Title VII of the Civil Rights Act, 42 U.S.C. 2000(e) et seq., and Section 1 of the Civil Rights Act of 1866, 42 U.S.C. 1981, seeks redress for alleged racial discrimination in employment practices. After extensive and prolonged pretrial proceedings, the case came to trial in 1973. At the conclusion of plaintiffs' case, Honorable Fred J. Cassibry, U.S. District Judge, granted defendant's motion pursuant to FRCP 41(b) for an involuntary dismissal on the ground that plaintiffs had shown no right to relief on either the individual or class claims. The Fifth Circuit Court of Appeals reversed, holding that plaintiffs had made a prima facie showing of discriminatory practices both on the individual and class claims. The case was remanded in order for defendant to present its case in chief, and for plaintiffs to present any supplementary evidence. *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374 (5th Cir. 1978).

On remand, the parties stipulated that the issue of Kaiser's liability would be tried and decided separately from the issue of any remedy or remedies required thereby. On August 28, 1980, after trial of the liability issue, it was determined that but for Harris Parson's active participation in the integration of facilites at the Kaiser Chalmettee plant, "by August of 1967, Parson would, more likely than not, have obtained at least provisional promotion to foreman." (Finding of Fact No. 8.) Accordingly, Parson was deemed to be entitled to a proceeding to compute the amount of backpay relief which he should receive for the period from August of 1967 to some specific point in time to be determined. A Special Master was appointed by the court for this purpose. (Conclusion of Law No. 4.)

By order dated May 26, 1982, Carol B. Hart, Esq., was appointed Special Master pursuant to FRCP 53 to take charge of the remedial proceedings, and to determine the amount of backpay that plaintiffs, including Harris Parson, are entitled to receive. By ruling dated February 7, 1983, the Special Master determined that Parson was entitled to an award of $71,669.00, representing backpay from September 1, 1967, through June 30, 1982, the date on which the matter was submitted to the Special Master. Interest was awarded at the various Louisiana legal interest rates in effect over the years this action has been pending.

Kaiser filed objections to the ruling of the Special Master, contending that Parson's right to backpay should terminate as from April of 1972, the date Kaiser adopted a new, nondiscriminatory procedure for the selection of shift foremen. In response, plaintiff contends that this termination date would do violence to the "make whole" purpose of Title VII remedies. Plaintiff filed objections to the

ruling, contending that a greater amount of interest was due and further contending that the termination date should be the date upon which Kaiser closes its Chalmette, Louisiana, plant. Plaintiff has also filed a motion to adopt or modify and a motion for entry of final judgment.

An award of backpay to victims of employment discrimination is authorized under 42 U.S.C. 2000e-5(g). Although backpay is not an automatic or mandatory remedy, courts have consistently held that once it is determined that a plaintiff has sustained economic loss from a discriminatory practice, backpay should normally be awarded unless special circumstances exist. An award of backpay is designed to place the injured party, as near as possible, in the situation he would have occupied (here, more probably than not, shift foreman), absent the discriminatory practices. This is often alluded to as the "make whole" or "rightful place" rule. A district court has only a narrow discretion to deny an award of backpay. The good faith of a defendant is an insufficient basis upon which to deny an award of backpay. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *McCormick v. Attala City Board of Education*, 541 F.2d 1094 (5th Cir. 1976).

"Front pay" may be considered as that part of the backpay award which is calculated to terminate on the date a victim of discrimination attains an opportunity to move to his rightful place rather than on the date the order granting relief is given. The Fifth Circuit has stated that there may be cases in which such relief is appropriate, such as where a defendant has displayed long-term resistance to desegregation and to equal employment opportunities for blacks. *James v. Stockham Valves & Fitting CO.*, 559 F.2d 310 (5th Cir. 1977).

The Special Master clearly was guided by these prevailing legal standards in tailoring an award of backpay for Harris Parson. Key factors in this regard are the imminent closure of the Chalmette plant and the voluntary cessation of the discriminatory selection procedure in April of 1972. Although the good faith of defendant will not excuse an award of backpay to which a plaintiff is otherwise entitled, it does seem to make an award of front pay inappropriate in the circumstances of this case. Taking into account the totality of circumstances in this case, I conclude that the relief awarded by the Special Master substantially achieves a fair and just result for Harris Parson. Accordingly, the Opinion and Judgment of the Special Master are adopted as the findings and conclusions of this court in all respects, including the award of interest.

Plaintiff's counsel is directed to prepare a final judgment pursuant to FRCP 54(b).

PETER BEER

COUNSEL OF RECORD

## APPENDIX "J"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NUMBER 67-1257
SECTION M

HARRIS A. PARSON

Plaintiff,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION.

Defendant.

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JUDGMENT

In accordance with the Minute Entry entered in this cause on April 27, 1983,

It is Ordered and Adjudged that plaintiff Harris A. Parson shall recover of the defendant Kaiser Aluminum & Chemical Corporation the sum of $113,093.74, plus simple interest on the foregoing amount at the rate of twelve (12%) per cent per annum from June 30, 1982 until the date of payment.

It is further Ordered and Adjudged that plaintiff Harris A. Parson shall be accorded by defendant Kaiser Aluminum & Chemical Corporation the pension rights to which he would now be entitled had he been promoted to shift foreman in August, 1967, and remained a shift

foreman until his actual retirement or separation from Kaiser.

In accordance with the provisions of Rule 54(b) of the Federal Rules of Civil Procedure, the court expressly determines that there is no just reason for delay and directs the entry of this final judgment.

Done this 18th day of May, 1983 in New Orleans, Louisiana.

/S/ Peter Beer
PETER BEER
UNITED STATES DISTRICT JUDGE

Approved as to Form:

/S/ Signed

/S/ Signed
Counsel for Plaintiff
Harris A. Parson

/S/ Carl J. Schumacher, Jr.
Counsel for Defendant
Kaiser Aluminum & Chemical Corp.

## APPENDIX "K"

**Harris A. PARSON and Arcell Williams,**

**Plaintiffs,**

**Harris A. Parson,**

**Plaintiff-Appellee-Cross-Appellant,**

**v.**

**KAISER ALUMINUM & CHEMICAL CORP., et al.,**

**Defendants,**

**Kaiser Aluminum & Chemical Corp.,**

**Defendant-Appellant Cross-Appellee.**

**No. 83-3312**

United States Court of Appeals,
Fifth Circuit.

March 19, 1984.

United States District Court for the Eastern District of Louisiana dismissed individual and class claims of racial discrimination in employment. The Court of Appeals, 575 F.2d 1374, reversed and remanded. After denial of petition for rehearing, 583 F.2d 132, and on remand, the United States District Court for the Eastern District of Louisiana, Peter Beer, J., 497 F.Supp. 339, rendered judgment against employer on individual claim, and employer appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that: (1) District Court applied proper legal standard in holding employer liable to plaintiff for intentional racial

discrimination and did not require employer to prove absence of racial motivation in decision not to promote plaintiff; (2) employer was not entitled to invoke bona fide occupational qualification exception to Civil Rights Act liability for deliberate decision to scrutinize black applicants more carefully than whites; (3) finding that effects of employer's failure to promote plaintiff in 1967 would continue to be felt until plaintiff received promotion he was unlawfully denied was not clearly erroneous; and (4) award of prejudgment interest on back-pay award was proper.

Affirmed.

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Appeals from the United States District Court for the Eastern District of Louisiana.

Before POLITZ, RANDALL and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Kaiser Aluminum & Chemical Corporation (Kaiser) appeals judgment rendered against it on the individual claim that Kaiser denied the appellee Harris Parson promotion to a foreman's position in violation of rights secured to him under Title VII of the Civil Rights Act of 1964, as amended, and by 42 U.S.C. § 1981. We affirm.

I.

This appeal arises from a suit originally filed in September 1967. Its lengthy procedural history has been set out in several prior published opinions. The first time this case went to trial, the district court dismissed the

plaintiffs' claims, after the presentation of their case, under Fed.R.Civ.P. 41(b). This court reversed and remanded, holding that the plaintiffs had established a prima facie case of racial discrimination with respect to individual and class claims. *Parson v. Kaiser Aluminum & Chemical Corp.*, 575 F.2d 1374, *reh. denied*, 583 F.2d 132 (5th Cir.1978), *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979). On remand, the liability phase of the litigation was completed, and judgment was rendered against Kaiser on several claims by the district judge who referred the case to a special master for recommendations as to remedy. *Parson v. Kaiser Aluminum & Chemical Corp.*, 497 F.Supp. 339 (E.D.La.1980). Dealing with Parson's individual claim first, the special master recommended judgment in Parson's favor in the amount of $71,669, plus interest. The district court adopted the master's findings and entered final judgment in that amount for Parson, certifying the case for immediate appeal under Fed.R.Civ.P. 54(b). We are now concerned only with the final judgment on Parson's individual claim.

II.

The district court articulated a number of fact findings relevant to Parson's individual claim in its 1980 opinion. Kaiser does not challenge the validity of any of them. This appeal is based on Kaiser's contention that the district court applied an incorrect legal standard in holding it liable to Parson for intentional racial discrimination. Kaiser also challenges the amount of the back pay award.

III.

A.

Since the district court entered its findings on

liability in this case, the Supreme Court has clarified the role of the fact finder in Title VII[1] cases with two opinions: *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), and *United States Postal Service Board of Governors v. Aikens*, __ U.S. __, 103 S.Ct. 1478. 75 L.Ed.2d 403 (1983). It is clear that the Supreme Court's intervening opinions changed the law, at least in this circuit, with respect to the evidentiary burdens borne by the parties after a prima facie case has been established in a Title VII suit.[2] Before *Burdine* was decided, courts in this circuit had held that if the plaintiff made out a prima facie case of racial discrimination, the defendant, in order to prevail, had to present evidence capable of persuading the trier of fact that the challenged employment decision was made for a non-discriminatory reason. *See Turner v. Texas Instruments, Inc.*, 555 F.2d 1251 (5th Cir.1977); *Parson, supra*, 575 F.2d at 1374; *Burdine v. Texas Department of Community Affairs*, 608 F.2d 563 (5th Cir. 1979). In reversing the latter decision, the Supreme Court made it clear that the defendant's burden

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[1] Remedies for employment discrimination under 42 U.S.C. § 1981 are considered only if the plaintiff asserts claims on grounds different from those underlying the Title VII claims. We find no such distinction in the evidence in this case and therefore analyze Parson's claim under Title VII. *See Rivera v. City of Wichita Falls*, 665 F.2d 531, 534 n.4 (5th Cir.1982); *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608, 612 (5th Cir.1983).

[2] A plaintiff in a Title VII case may establish a prima facie case of racial discrimination by showing "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). The elements of a prima facie case may differ depending upon the factual situation from which a Title VII claim arises. *Id.* at n. 13.

is simply to articulate a non-discriminatory reason for the challenged action. Judgment automatically is rendered for the plaintiff only if the defendant is "silent in the face of the presumption" created by the prima facie case. 450 U.S. at 254, 101 S.Ct. at 1094, 67 L.Ed.2d at 216. Once the plaintiff has established a prima facie case and the defendant has articulated a non-discriminatory reason for its action, the trier of fact must decide whether the defendant intentionally discriminated against the plaintiff. The ultimate burden of persuasion on this issue remains at all times with the plaintiff. 450 U.S. at 253, 101 S.Ct. at 1093, 67 L.Ed.2d at 215.

The Supreme Court further explained the role of the fact finder in a Title VII case in *Aikens*, a case which had been fully tried on the merits. On appeal, the Postal Service claimed that the plaintiff had never made out a prima facie case. The Supreme Court held that, once the defendant had articulated non-discriminatory reasons for failing to promote the plaintiff, whether the plaintiff had established a prima facie case became irrelevant, because the district court had before it all the evidence necessary to decide the ultimate issue of intentional discrimination. __ U.S. at __, 103 S.Ct. at 1482, 75 L.Ed.2d at 410. "At this stage, the *McDonnell-Burdine* presumption 'drops from the case,'...and 'the factual inquiry proceeds to a new level of specificity.' " *Id.* (Citations omitted.) Once the parties have presented evidence on the intent issue sufficient to meet their intermediate evidentiary burdens, the district court "must decide which party's explanation of the employer's motivation it believes." *Id.* The Supreme Court admonished trial courts and reviewing courts against making this inquiry "even more difficult by applying legal rules which were devised to govern "the allocation of burdens and order of presentation of proof,'...in deciding this ultimate question." *Id.* (citation omitted).

Since *Aikens* was decided, we have noted that in fully tried cases in which intentional discrimination is at issue, the appellate court is not to concern itself with "the adequacy of a party's showing at any particular stage of the *McDonnell Douglas* ritual...." *Elliott v. Group Medical & Surgical Service*, 714 F.2d 556, 546 (5th Cir.1983). Rather, appellate review centers on the fact finder's ultimate conclusion as to the employer's motivation. *Williams v. Southwestern Bell Telephone Co.*, 718 F.2d 715, 717-18 (5th Cir.1983).

B.

It is Kaiser's contention that the district court in this case applied this circuit's pre-*Burdine* standard, requiring the company to prove the absence of racial motivation in is decision not to promote Parson. Kaiser argues that the district judge entered judgment against it because it failed to rebut, by a preponderance of the evidence, Parson's prima facie case. Kaiser rests its arguments primarily on the district court's findings numbered twelve through fifteen, in which the court considered "the business requirements of Kaiser to determine if they have a manifest relation to Parson's failure to achieve promotion. *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977)." 497 F.Supp. 342.

Considering the opinion of the district court as a whole, we disagree with Kaiser that the district court rendered judgment for Parson solely because of its application of the *McDonnell Douglas* burdens of proof. First, the district court considered the evidence establishing Parson's prima facie case and the reasons articulated by Kaiser for failing to promote Parson. The district court set forth in its findings of fact exactly what it found to be

Kaiser's motive for not promoting Parson: "Parson had...sought to involve himself in a leadership role among the black employees at the Kaiser plant in connection with various management-based attempts to eliminate racially segregated facilities...." 497 F.Supp. at 341. The district court explicitly stated that *but for* these activities "Parson would have been considered for and, more likely than not, subsequently promoted to the rank of foreman...." *Id.* at 342. The district judge made an explicit finding in this first phase of the opinion that Kaiser's "reluctance in promoting Parson" was based on factors including "the company's not necessarily misplaced fear that Parson's promotion would trigger a violent and prolonged (and, thus, expensive) reaction on the part of certain white, racially-motivated employees...." *Id.* at 342 n. 2. This conclusion is supported by the record and especially by the testimony of Richard Humphrey, a Kaiser supervisor. Humphrey had the primary responsibility for bringing the metal products department, where Parson worked, into compliance with the Civil Rights Act of 1964. Humphrey testified that:

> Aside from the desegregation of all plant facilities, we were engaged in an effort to locate and promote a black to the first line supervisory position, but we were extremely conscious of the fact that that black had to succeed—had to be successful with all the turmoil we had gone through. We were very concerned that should a first black or blacks—the first few that took salaried employee positions—be less than extremely well qualified, and supported that we would have lost a lot of ground in our effort to establish credibility in having black supervisors. It was a long time to find and to get blacks to accept positions of that much risk and responsibility because there was significant risk.

The language of finding number ten clearly expresses the district court's finding on the ultimate issue of intent. We see no other way to read it: the district court obviously believed Parson's explanation of Kaiser's motivation in denying his application.

Having decided the factual issue of Kaiser's intent, the district judge next addressed a defense raised by Kaiser to liability under Title VII. The district judge's reference to *Dothard v. Rawlinson* in finding number twelve indicates to us that the findings following number twelve were made to support his legal conclusion that Kaiser was not entitled to invoke the bona fide occupational qualification exception to the Civil Rights Act. *See Dothard*, 433 U.S. at 333, 97 S.Ct. at 1788-89, 53 L.Ed.2d at 800.

The district court acknowledged that the evidence before it demonstrated that Kaiser's management was making good-faith efforts to comply with the Civil Rights Act of 1964, but that these efforts were hampered by fear of racially motivated violence. The district court found that, "there is evidence of instances of de facto discrimination occasioned by timidness and vacillation resulting from fear and concern for the overall plant operations. This de facto (though unintentional) discrimination is understandable and yet unacceptable." 497 F.Supp. at 342-43. This finding is followed in the very next sentence, by the district court's conclusion that blacks seeking promotion were required to show greater ability than whites. Kaiser argues that this finding, and especially the use of the word "unintentional," is tantamount to a finding of absence of discrimination. We disagree. Kaiser reads the district court's findings out of context. It is clear that, after a full review of the evidence, the district judge found Kaiser to

have consciously adopted a higher standard of review for foreman applications made by black employees. It is also clear that the district judge found this discriminatory policy to have been the "but-for" cause of the denial of Parson's application. The district court's findings must be read as a response to Kaiser's contention that it was justified, because of the violent atmosphere at the Chalmette plant, in requiring black applicants to be more highly qualified than white applicants. This response has nothing to do with the factual issue of intent, as Kaiser now asserts on appeal. Rather, it addresses the question whether Kaiser had advanced a defense to liability for its deliberate decision to scrutinize black applicants more carefully than whites. The district court correctly found that Kaiser had not asserted a valid defense under Title VII. *See City of Los Angeles Department of Water v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978); *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 436 U.S. __, 103 S.Ct. 3492, 77 L.Ed.2d 1236 (1983).

As we noted previously, Kaiser has not suggested in its appeal that the district court's findings regarding its motivations are clearly erroneous, and we are bound to accept them. Because the district court found, after reviewing the entire evidence, that Kaiser had intentionally discriminated against Parson, and because we agree with its conclusion that such discrimination was illegal under Title VII regardless of the fact that it was not invidious, we must uphold the judgment that Kaiser is liable to Parson for damage caused him by that discrimination.

IV.

Kaiser raised several objections to the manner in

which the special master calculated the back pay award and interest due Parson. The district court considered and rejected these arguments. We do the same, noting at the outset that what amount of back pay will fairly compensate a successful Title VII plaintiff is a question of fact. The district court's findings regarding compensation will, therefore, be rejected on appeal only if clearly erroneous. *Marks v. Prattco, Inc.*, 633 F.2d 1122, 1125 (5th Cir.1981); *Chescheir v. Liberty Mutual Insurance Co.*, 713 F.2d 1142, 1150 (5th Cir.1983).

The district court awarded Parson the difference between a foreman's salary and the wages he actually earned during the period from September 1967 to June 1982. Kaiser argues that the back pay period should have terminated in April 1972, when a nondiscriminatory selection procedure was instituted, or at the latest in March 1973, when Parson's application for a foreman's position was rejected under the new procedure. Parson argues that he continued to suffer the detriments of discrimination after 1973; if he had been promoted earlier, he would have continued to hold the higher-paying position even after Kaiser began to use a new procedure for handling applications. Both the special master and the district judge considered the argument now raised by Kaiser. They concluded that the 1973 denial of Parson's application did not vindicate Kaiser or absolve it from liability for the effects of its past discrimination. The district court, in accepting the special master's recommendation, implicitly found that the effects of Kaiser's failure to promote Parson in 1967 will continue to be felt until Parson receives the promotion he was unlawfully denied. *See Parson*, 575 F.2d at 1391. We do not find this conclusion to be clearly erroneous.

Kaiser also argues that the award of prejudgment

interest on the back-pay award is not explicitly authorized, and therefore not allowed, by 28 U.S.C. § 1961, which provides for the award of postjudgment interest. The great weight of authority indicates otherwise; indeed, Kaiser cites no cases supporting its position. Prejudgment interest as awarded by the district court[3] has been approved by this court in similar cases. *See Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 263 (5th Cir.1974); *Whiting v. Jackson State University*, 616 F.2d 116, 127 n. 8 (5th Cir. 1980). The award of prejudgment interest in this case reflects an appropriate exercise of the district court's authority to fashion relief which makes whole the injured party.

V.

For the reasons stated herein, the judgment of the district court is

AFFIRMED.

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[3] Kaiser also argues that prejudgment interest should have been allowed only on the after-tax value of the award and that the interest should have been simple rather than compound. We find no error on the part of the district court in these respects.